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## CONCEPT OF EQUITY

### Nature and Scope of Law :

Man is inherently a social being. It is not possible for him to live or satisfy his wants or desires as an isolated individual. Partly by nature and partly by force of circumstances he comes into contact and has his dealings with others. All men are, however, not capable of thinking or acting together in the same way. It is in this similarity in nature or purpose and the diversity in thoughts or actions that we find controversies or conflicts among individuals. These conflicts must be resolved.

It is possible for individuals involved in a particular controversy to sit together, ascertain and give effect to the right or make amends for the wrong. But it is ordinarily not possible for a human being to think dispassionately and the self-interest of the individual concerned is likely to vitiate his judgment in his own case. There is a story that a savage, on being asked what was the difference between right and wrong, answered : "It is right when I take my neighbour's wife, but it is wrong when he takes mine." Such a notion cannot, of course, be expected of a civilised man but the story does demonstrate the immutable character of a human being.

It is thus essential for the parties to entrust their case for decision to a third person not connected with or interested in the controversy. Such a reference always assumes the confidence and faith of the parties in the impartiality and sound judgment of the arbitrator and implies their submission to his award.

Such a means for resolving controversies is, however, beset with certain defects or difficulties. It is desirable that people should know what is right and what is wrong before any commission or omission. It is further necessary that rights and duties or liabilities of persons should not rest on or fluctuate with the notions of a particular arbiter. There should be the maximum possible certainty, uniformity and reason in such judgments or rules on which they must be based. The greatest difficulty in settling disputes, no doubt, lies in enforcing such awards. In some cases, of course, the conscience of the individual concerned may and does suffice but in others some sort of external sanction is necessary. Such an external sanction may be available from the approbation and disapprobation of the society and, indeed, it goes a long way in achieving the object in question. Still there are and must remain cases in which a more certain and coercive sanction would be required.

All these requirements are supplied by or secured through the State or more particularly the sovereign political authority in the State.

Thus, besides collective security and prosperity one may ultimately trace in the fair and effective solution of the conflict of the rights and interests of individuals, the urge of the people to recognize, submit to or organize themselves into a sovereign political authority entrusted *inter alia* with the task of defining, determining and enforcing the rights and obligations of the people. Such a collection or class of people, inhabiting a particular territory and united together under a common superior to which has been accorded or secured their

habitual obedience is called the State. The power to which such allegiance has been pledged is called the sovereign political authority in the State. It may comprise of or reside in an individual or a group or class of people. It ordains directly or indirectly, expressly or impliedly, a general course of conduct for persons in its territory with an effective sanction for its due obedience. Such rules of conduct *inter alia* are called the law of that State. The body of law in a State must be in conformity with the general sentiments, notions and aspirations of its people or at any rate must be commensurate with the extent of submission shown by or expected from them.

#### Sources of Law :

The system of law prevailing in a State, springs up from or has been framed on the basis of cases that have arisen in the past or those that may be anticipated for the future. But it is not possible to imagine a network of law which is comprehensive enough to cover adequately or appropriately every possible case and for all times. There may arise a particular situation which could not be conceived by the State in advance and as such remains unprovided for. There may then be a case which is covered by a particular rule of law different but the circumstances are or the consequences would be so peculiarly that it cannot be fair or just to apply that rule to the case in hand.

It is, therefore, essential that there must be a machinery which may, by modification or innovation, help the existing body of law in the State to keep pace with the variations in the circumstances, ideas and needs of its people. Such an elevation of law may be and is often, to a large extent, accomplished through legislation. But it requires a pretty long time and procedure for enacting a law and, moreover, the Legislature cannot be stimulated to action for every isolated simple case. The void in question may, in the next place, be filled up by custom or such customary rules which emanate from individuals, and have been voluntarily followed by the community to such an extent that the State places them on the footing of law. Such customs are, however, so rare and general and the requisites for their validity are of such a nature that they cannot be of much assistance in this sphere.

It is obvious, therefore, that notwithstanding a body of existing laws in the State and machinery of legislation and the process of customary law to keep it in a state of perfection, it so happens that the court becomes seized of a case which is not covered at all or is not covered adequately or appropriately by the existing law in the State. The function of the courts being to interpret or apply and not make or enact law, they cannot, strictly speaking, be of any assistance in disposing such cases.

The courts have, indeed, coped some to an extent as it is with such contingencies by resorting to legal fictions,<sup>1</sup> i. e. assuming such facts which though not literally true enables it to extend an existing rule to a new situation or case. This is a device by the courts for supplying the deficiencies in the judicial machinery without an avowed overstepping of its power simply to declare the law. Legal fictions have, however, been much too rare, artificial and defective to secure an effective control of the situation and it is desirable that the State should have, besides the aforesaid agencies, some arrangement or authority for deciding cases for which there is no definite or appropriate rule of law.

#### Equity as a Source of Law :

It may be that the courts are expressly authorized to evolve an appro-

1. For instance, the extension of the law of master and servant to an action for seduction of a minor on the fiction of the parent's loss of service due to the resulting confinement.

prate rule for decision in such cases. This is so, for instance, in the Swiss Code which lays down that in the last resort the judge should apply the rule which he would establish if he were acting as legislator or in the Austrian and German Civil Codes which provide that the courts should decide such cases in accordance with the principles of natural law. Or, it may be that the existing courts are, like those in France, assumed to be inherently vested with such a power. Or the power may be recognized or vested in some other functionary of the State as was the Praetor in Roman Law or the Chancellor under English Law. Wherever this power or discretion may reside or be vested and whatever may be the mode or extent of its exercise it is evident that the court or functionary in question would decide such cases by evolving and applying rules or doctrines according to his innate idea of fairness and justice which would naturally be similar to or consistent with the notions or sentiments of the society in general or of humanity at large or as a class. One important aspect or characteristic of such rules, especially in contract to those enacted through legislation, is that while the latter is largely prompted or influenced by the policy of the State and is designed to attain the maximum amount of generality; the innate or absolute idea of justice is not affected by any such factor or consideration in the former.

The principles and rules emerging from the exercise of this residuary power forms an important, distinct and living source of law in the State.

Such a machinery for enlarging and adapting the existing law to the new cases and conditions of society has been the need and, as a matter of fact, forms part of every legal system. It was known to the Greeks and the Greek term variously distorted, reappeared in mediaeval discussions, coupled laterly, with its equivalent in classical and Latin, '*Acquitas*' whence the term equity. 'Equity', as a branch of any legal system, may, therefore, be defined as the principles or rules emanating from the administration of justice through a power and duty vested in the judges in those cases which are not covered or adequately provided for by the existing law of the land.

In England, equity originated in chancery where the chancellor sat as the "keeper of the king's conscience" to give relief to the king's subjects in cases of hardship, by the application of the principles of morality or conscience. But equity is not to be identified with morality.

### Nature and Scope of Equity :

Equity is an equivocal term and it has been used in diverse senses. The literal meaning given to equity is 'right as founded on the laws of nature', 'fairness', 'justice' and this corresponds with the popular notion about this expression. It is, however, difficult to ascertain the meaning of equity, as a scheme of jurisprudence, distinct from law. It would be useful to try some of the definitions of equity in this context :

"Equity is the correction of the law where it is defective on account of its generality"—Aristotle (adopted by Grotius and Puffendorf).

"Equity means any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidently to supersede the civil law by virtue of a superior sanctity inherent in those principles"—Sir Henry Maine.

".....equity is an intellectual energy, it is influenced by the gradual changes in the mental standpoint taken by successive generations. It thus moulds its deductions from one set of data as the common law to another into continued adaptations to the growing needs of society..."—West, J.<sup>2</sup>

2. In re Kadhandas Narrandas, (1880) 5 Bom. 154, 172.



These like diverse other definitions available on the point, no doubt, give a clear impression of the nature of equity but do not lead to a precise idea of the scope or limits of equity jurisdiction. And it is, indeed, not possible to lay down a general or universal rule which is or ought to be prevalent in all countries or systems of law since it would depend on the legal structure and policy of each State. The following may, however, be stated as the possible views on the place or scope of equity jurisdiction in any legal system :

1. The most general and extensive view on the domain of equity appears to be that given by Aristotle : "It is equity to pardon human failings, and to look to the law-giver and not the law ; to the spirit and not to the letter ; to the intention and not to the action ; to the whole and not to the part ; to the character of the actor in the long run, and not in the present moment ; to remember good rather than evil, and the good that one has received rather than the good that one has done, to bear being injured, to wish to settle a matter by words rather than by deeds ; lastly to prefer arbitration to judgments for the arbitrator sees what is equitable, but judge only the law, and for this an arbitrator was first appointed in order that equity might flourish."

Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman Law, which has been justly thought to deal to a vast extent in matters *ex aequo et bono*. never effected so bold a design. It need always be remembered that an unrestricted equitable jurisdiction would defeat the most important object or aspect of the law. It would introduce at least uncertainty in law and insecurity in legal rights and most likely arbitrariness in the administration of justice.

2. A more limited view on the domain of equity is that ascribed by Blackstone : "Equity, in its true and genuine meaning, is the soul and spirit of all law ; positive law is construed and national law is made by it. In this, equity is synonymous with justice, in that it is the true and sound interpretation of the rule."

This statement, on the meaning and province of equity, has, in the words of Story, "the sanction of jurists in ancient as well as in modern times", and in this sense equity must have "a place in every rational system of jurisprudence, if not in name, at least in substance."<sup>3</sup>

The correct scope of equity jurisdiction, it is submitted, ought to be that defined by the maxim : "Equity will not suffer a wrong to be without a remedy."<sup>4</sup>

### An Outline of Equity :

The essential marks of equity as a branch of any legal system may be summarised as follows :

1. Equity, as a source of law, owes its existence to the fact that society is inestimable and dynamic and that it would always be ahead of the law in that society or State.
2. To safeguard or promote the interest of justice against the rigidity, defects or deficiencies of the existing law in the State, a supplementary jurisdiction has to be exercised by some authority in every legal system.

3. Story's Equity Jurisprudence, 3rd ed., p. 5.

4. See Ch. V. infra.

3. This authority or jurisdiction may be vested in the existing or common courts or, in the alternative, special courts may arise or be constituted for this purpose. The mode of exercise or the extent of this jurisdiction would depend on the conditions or needs of a particular State.
4. Generally speaking, this jurisdiction is not exercised in cases where an appropriate and effective remedy is available through the common, general or express law of the land.
5. These courts exercise what is called jurisdiction and may be courts of equity exclusively or together with other jurisdictions.
6. The principles or rules originating in or recognized and enforced by these courts are called equity and have the same sanction and force as any law in the State and are, generally speaking, included in the expression "law of a State".
7. This distinctive feature of equity lies in its origin and to distinguish it from the rest of the law—statute and customary etc.—the term law is used in a restricted sense as inclusive of all law in the State except equity.
8. Courts of equity generally follow the law as far as possible and act upon its analogy in so far as it may be available, and in the absence of both they proceed on the principles of natural law, *i. e.* such rules of conduct which are supposed to be just that they are binding on all mankind.
9. Equity, as a branch or department of any legal system, is not like those of contract, property or evidence etc. but concerns and permeates, in so far as necessary or permissible in a particular State, all the branches of law since the deficiencies or defects in the law or the need for the exercise of equitable jurisdiction cannot be exclusive to any one department of law.
10. Just as society progresses, the legal machinery in the State becomes more efficient and comprehensive, and the equitable principles or rules, in the course of time, become incorporated or assimilated in the formulated law. The scope for cases without an appropriate rule of law gradually becomes more and more restricted and accordingly the importance or need of equity generally diminishes but it would be wrong to think that as a branch of any legal system it can ever be unnecessary or extinct.

In equity, as a branch of any legal system, one has, therefore, to study the authority in which such a jurisdiction is vested, the way in and the limits within which it has to be exercised, its relation with law or law courts, the various principles or rules that have arisen or been evolved through the exercise of this jurisdiction, the circumstances under which these rules emerged, the way they have developed and the form in which they exist today.

## EQUITY UNDER THE ROMAN, ENGLISH AND INDIAN LEGAL SYSTEMS

### Equity under Roman Law :

In the earliest period of the Roman Law, there were five actions (*legis actionis*) for the enforcement of all civil rights. Nothing could exceed the arbitrariness and formalism of these judicial proceedings.

The Praetor was the supreme judicial magistrate of the Roman Republic. The jurisdiction of the Praetors, which was exercised by means of formulae and in which a judex or other lay person was called in to decide the issues of fact, was called his ordinary jurisdiction. The judgments or the administration of justice, according to *jus civile* and the technical requirements as to the proper formula or kind of action were strictly adhered to.

In the latter periods of the Republic, there arose another jurisdiction of the Praetor which is called his extraordinary jurisdiction. The Praetor, though technically without any authority to legislate began to exert, during his years of office, a power over all judicial process which, at first confined within narrow bounds by the formality of the ancient system of pleading, became in latter times almost unlimited. Each Praetor on entering upon his functions set out a list of the rights and remedies which he would recognize during his regime and gave public notice in his edict of the modes in which he intended to give relief against the rigidity of the established system. Whenever an adherence to the old *jus civile* would do a moral wrong and produce a result inequitable, the Praetor conforming his edict or decision to the law of nature, provided a remedy by means of an appropriate action or defence. Gradually the cases as well as the modes in which he would thus interfere, grew more and more common and certain and thus a body of moral principles was introduced in the Roman Law which constituted equity (*aequitas*) by the side of *jus civile*. "Thus it was, that alongside of the proprietary rights open to Roman citizens alone, there was introduced a system of possession protected by interdicts and fictitious actions which had all the advantages of ownership. Effect was given to contracts which could not be found in the limited list of those recognized by the law, and the wills which were neither sanctioned by the *comitia* nor solemnized by a sale of the inheritance with copper and scales. While succession *ab intestato* still passed by law to the members of the artificial 'agnatic' family, its benefits were practically secured to the blood relations."<sup>1</sup>

The extraordinary jurisdiction continued for a long time side by side with the ordinary. In 294 A. D. by a constitution of the Emperor Diocletian all causes in the provinces were required to be tried in the same manner ; and finally the same rule was made universal throughout the Empire.

### Equity under English Law :

In England after the Norman conquest there came into existence, by the middle of the thirteenth century three great Courts : the King's Bench, the Common Bench or Court of Common Pleas and the Exchequer. The law which these Courts administered was in part traditional or customary law and

1. Holland's Jurisprudence, 13th ed., pp. 39-40.

in part statute law and acquired the name 'common law'. The common law of the late thirteenth or early fourteenth centuries, in the words of Dr. Hanbury, "presents somewhat the appearance of a young infant Hercules, a strong young giant, and like most things that are both young and strong, obstinate and unyielding".<sup>2</sup> On account of the narrowness, extreme rigidity and formalism (strict adherence to form and precedents) of the common law courts, there frequently arose cases for which the common law gave either an inadequate remedy or no remedy at all.

In such cases a petition was made to the King in Council to exercise his extraordinary judicial powers. A custom developed of referring these petitions to the Chancellor (who was the chief of the King's secretaries and has been aptly described by Maitland as "the King's Secretary of State for all departments" and was usually a bishop) and this custom was confirmed by an order of Edward III in 1349. It was in dealing with these petitions that the Chancellor began his judicial function. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority and this practice continued and ultimately led to the establishment of the Court of Chancery besides the Courts of Common Law. The Chancellor, in disposing of these petitions, acted according to his judicial conscience or the principles of natural justice. Conscience in itself was based on universal and natural justice rather than the private opinion or conscience of the chancellor.

The principles and rules thus arising through the administration of justice in the Court of Chancery were called equity in contradistinction to common law. Upto the year 1873 there remained, in England, two separate sets of courts with different jurisdictions—the common law court acting on the principles of common law and the Chancery Courts acting on the principles of equity. The double system of the administration of justice was extremely inconvenient to the litigants and had many abuses which led to the passing of the Judicature Act in 1873. By this Act the two classes of Courts were amalgamated and reconstituted. The Courts no longer remained those of common law and of equity, but became, in respect of the causes and matters, within the sphere assigned to them, courts of complete jurisdiction recognizing and enforcing all the rights and remedies be it legal or equitable.

### Roman and English Equity.

Roman and English equity resemble in certain respects and differ in others.

The analogy between the two may be stated as follows :

- (1) Just as the authority on which English Equity was based was the royal prerogative, which was entrusted to the Chancellor, so the authority on which Roman equity was based was the *imperium*—a survival of the royal power to see justice done to the people—which vested in the Praetor during his year of office.
- (2) The object of both was the same—namely, to correct the rigours and deficiencies of the old law.
- (3) Both left the old law unrepealed.
- (4) Both were in, certain matters founded on analogy to the old law.
- (5) Both claimed to override the old law by virtue of an inherent superiority of principle.

- (6) Since both were devised as occasion required to meet the hardships of particular cases both were characterised by a lack of consistent lines of development as regards the relationship of their principles *inter se*, though each was developed consistently to its logical consequences.
- (7) In both the systems all distinctions between suits in equity and actions at law were ultimately abolished and the two jurisdictions were combined in the same proceeding and conferred upon the same tribunal.

The differences between the two are no less remarkable. They may be stated as follows :—

1. English equity was administered by a different official from the common law which led to all the hardships and inconveniences flowing from the conflict or variance between law and equity. Roman equity was administered by the same official as civil law and the conflict at Rome between equity and civil law was devoid of practical inconveniences.
2. English equity was judiciary law, and in many cases *ex post facto* in nature. Roman equity was in nature and form statute law embodying general principles to meet defects which had become apparent in the past.
3. The subjects covered by the two also present a distinct contrast. Originally, the main subject of English equity was the enforcement of trusts. Roman equity did not recognise the binding nature of trusts and Augustus (31 B. C.) had to appoint a special magistrate, called the Praetor *Fidei commissarius*, to enforce them. On the other hand, while the largest portion of Roman equity dealt with ameliorating the law relating to wills and intestate succession, English equity steadfastly refused to have anything to do with such matters.

#### Equity under the Indian Legal Systems :

In India there has been no work on equity as an independent branch of Indian law. It is, therefore, not possible to say much on this topic. It is, however, obvious that equity has had its due place and importance in the development of law under the Indian legal system. This is clearly noticeable not only in the Anglo-Indian Law but equally in the Mohanmedan and Hindu Law.

In so far as Hindu Law is concerned it has been laid down that, “in case of a conflict between the rules of *Smritis*, either may be followed, as reasonings on the principles of equity (*Yuktivichar*) shall decide the solutions”.<sup>3</sup>

The latter *Smriti* aras, namely, Narada and Brihaspati have categorically acknowledged the importance of equitable principles. Brihaspati has said that there would be failure of justice if the principles based on reasons are not followed. These principles of reason can be called principles of equity.

Jayaswal has also collected the authorities to the same effect. He says :—

“We may recall *Kautilya's* provision that if the Dharma-text is found

3. See for authorities West and Majid—Hindu Law. n. 14.

opposed to judicial reason the Dharma-text fails and there the authority of reason prevails.....Yajnavalkya says where there is a conflict between two Smritis texts, Reason (or Equity, as Mandlik puts it) is there stronger. Yajnavalkya does not permit a possibility of conflict between Reason and Text. He limits the superiority of Reason or Equity to a conflict between the Sastras themselves".<sup>4</sup>

With regard to the Mohammedan Law, their Lordships of the Privy Council observed :

"The Chapter on the Duties (*Adab*) of the kazi in the principal works on Mussulman law clearly show that the rules of equity and equitable considerations commonly recognized in the courts of Chancery in England, are not foreign to the Mussulman system, but are in fact often referred to, and invoked in the adjudication of cases."<sup>5</sup>

Under the British rule and administration of justice the Law Commissioners for preparing a body of substantive law for India recommended<sup>6</sup> that the judges should decide those cases for which there is no provision in law "in the manner they deem most consistent with the principles of justice, equity and good conscience".

The Supreme Court was, by the Regulating Act, 1773 which established it, also constituted a court of equity and the rule of 'justice and good conscience' was, by section 17, expressly laid down for the guidance of judges for the decision of cases not covered by any rule of law. After the abolition of the Supreme Courts and with the establishment in their places of the High Courts in the three Presidencies, the equity jurisdiction was, by clause 19 of the Letters Patent, preserved to those High Courts. The same rule was laid down for the Mufassal Courts under clause 9 of Regulation VII of 1832. The same provision has been carried forward in subsequent Acts and continues to be the governing rule today. So in India we do not have and, indeed, never had a separate court, as was in England before 1873, for exercising equitable jurisdiction. The courts which are courts of equity as well as law,<sup>7</sup> as enjoined, decide those cases for which there is no provision under the existing body of law according to the principles of 'justice, equity and good conscience'.<sup>8</sup>

Even in places where there was no statutory provision to that effect judges could conform and act according to the principles of justice, equity and good conscience in the absence of specific law on the point.<sup>9</sup>

It need be noted that the equitable jurisdiction, being vested in and exercised by the existing or general Courts, the administration of justice in India does not, as observed by Dr. Banerji, "suffer by reason of any unnatural divorce between law and equity".<sup>10</sup>

#### **Importance of English Equity in the Indian Legal study :**

The importance of the study or knowledge of equity under the English law as an aid to the legal study in India should not be underestimated.

4. Manu & Yajnavalkya by K. P. Jaiswal, p. 80.
5. Hamira B. v Zubaida B., (1916) 43 I. A. 294, 301-302.
6. First Report, p. 9, Second Report, p. 10.
7. Raja Rampal Singh v. Surendra Bikram, A. I. R. 1937 Oudh 82, 85.
8. Watson v. Ramchand, I. L. R. (1891) 18 Cal. 10.
9. Murari Lal v. Devkaran, A. I. R. 1965 S. C. 225, 230.
10. Law of Specific Relief in India, pp. 280-281.

Pomeroy, in emphasizing the importance of *aequitas* in the Roman Law for the purposes of equity in England has observed as follows :—

“The growth and functions of equity as a part of the English law were anticipated by a similar development of the same notions in the Roman jurisprudence. In fact, the equity administered by the early English Chancellors, and the jurisdiction of their Court, were confessedly borrowed from the *aequitas* and judicial powers of the Roman Magistrates ; and one cannot be understood without some knowledge of the other.”<sup>11</sup>

It need not be emphasized that the above observation would be equally true in India not only with regard to the English equity but also the English common law. Principles and rules of English law permeate through the bulk of the Indian legal texture and an insight of the English law is indispensable for the purposes of a correct approach and understanding of the Indian law.

Most of our statute law and the administration of justice are based on English law and its legal structure and as things are or may normally be anticipated for the near future it is unlikely that any substantial change or divergence would be introduced even if such a change over in fundamentals may be deemed necessary or expedient.

“In fact”, as observed by the Supreme Court in *Official Trustee, W. B. v. Sachindra*,<sup>12</sup> “in this country we have codified the very points that were exercised by the Chancery Courts in England under their equitable jurisdiction”.

We have borrowed from English equity full grown or mature rules without any process of trial and error. The conspicuous examples are :— The Specific Relief Act, 1877, the Indian Trust Act, 1882 and most of the provisions in the Transfer of Property Act, 1882 and it is not possible to have a clear comprehension or correct appreciation of the law on these subjects without knowing their historical antecedent and development from English Law.

The provisions of the Specific Relief Act, for instance, that the jurisdiction to decree specific performance is discretionary or that as a general rule, the specific performance of contracts for the transfer of immovable property would and those of movable property would not be decreed, cannot be clearly and fully understood unless one gets to the very root of these rules which he can discover not in the Indian but the English legal history.

Similarly, the very definition of trust under section 3 of the Indian Trust Act, 1882, *viz.* “trust is an obligation annexed to the ownership of property.....” cannot be clearly understood or explained without a knowledge of the history of trust or history and the relation of common law Courts and Courts of Chancery in England.

Similar is the case with regard to the law of mortgages in our country and the importance of the study and knowledge of English law in this respect cannot be stressed better and more authoritatively than through the following expressions of Sir Rashbehari Ghose in relation to the English law of mortgage :

“I need hardly point out that the English system has peculiar claims on the attention of the Indian student, not, however, entirely due to

11. Pomeroy's Equity Jurisprudence, 5th ed., Vol. I, p. 3.

12. *Official Trustee, W. B. v. Sachindra*, A. I. R. 1969 S. C. 823, 831.

its intrinsic merits. A good deal of the law relating to mortgages in this country is judge-made, and English cases and text-books are freely cited in our Courts as authorities. This practice had led to the introduction of much law of very doubtful equity but of most undoubted subtlety, the only apology for which, if it may be said without disrespect, is to be found in the fluidity of our law, and I may be permitted to add, the facility with which it can be consolidated with the help of English text-books."<sup>13</sup>

Similarly in a case under the Contract Act, the Supreme Court observed, "In the administration of the law of contracts, the Courts in India have generally been guided by the rules of the English Common Law applicable to contracts where no statutory provision to the contrary is in force. The Courts in the former Presidency-towns by the terms of their respective letters patents, and the Courts outside the Presidency-towns by Bengal Regulation III of 1793, Madras Regulation II of 1802 and Bombay Regulation IV of 1827 and the diverse Civil Courts Acts were enjoined in cases where no specific rule existed to act according to "law or equity" in the case of chartered High Courts and elsewhere according to justice, equity and good conscience—which expressions have been consistently interpreted to mean the rules of English Common Law, so far as they are applicable to Indian Society and circumstances".<sup>14</sup>

Mention in this connection may be made of the decision in *Radha Rani v. Hanuman Prasad*.<sup>15</sup> Reviewing the cases on the point, it was held that it is open to the reversioner to maintain a suit for a declaration that an alienation made by a Hindu female limited owner before the coming into force of the Hindu Succession Act, 1956, was without legal necessity and was not binding on the reversioners. It was further held that in the event of the death of the widow, the heirs of the widow could not be said to be necessary parties and as such failure to substitute them in the place of the widow could not preclude the continuance or result in the abatement of the suit. The question whether the widow was, in view of the Illustration (e) to section 42 of the Specific Relief Act, 1877, a necessary party to the reversioner's suit was, however, left open.

The guiding rule for the judges in exercising their equitable jurisdiction, as stated earlier, has been "justice, equity and good conscience". Sir Fitz James Stephen seems to have maintained that such phrases mean "little more than an imperfect understanding of imperfect collections of not very recent editions of English text books".<sup>16</sup> The cases bearing on the point lead us to the following conclusions regarding the meaning and scope of this maxim :—

- (i) Resort to the principles of 'justice, equity and good conscience' for the decision of a particular case is permissible only where the point is not covered by the Statute or the General Law of the Land.<sup>17</sup>
- (ii) The rule of 'justice, equity and good conscience' is, subject to certain exceptions, identical with rule of English law.<sup>18</sup>

13. The Law of Mortgages in India, 5th ed., p. 23.

14. Bhagwandas v. Girdharilal & Co., A. I. R. 1966 S. C. 543, 549.

15. Radha Rani v. Hanuman Prasad, A. I. R. 1966 S. C. 216.

16. Stokes on Anglo-Indian Codes, Vol. II, p. 1159.

17. Baharji Maharaj v. Manmohan Das, A.I.R. 1939 All 141; Salu Bai v. Bajat Khan, 42 I. C. 200 (Nag).

18. Sheo Ratan Singh v. Karan Singh, A. I. R. 1924 All. 857.



- (iii) The rule of 'justice, equity and good conscience' means rules of the common law or of equity in England not as binding upon Indian Courts but only as a guidance in cases in which there is no law extant.<sup>19</sup>
- (iv) English law or equity is not applicable in India :
  - (x) Where it is local in character and is not suitable to the Indian Society and circumstances.<sup>20</sup>
  - (y) Where it is in a state of uncertainty.<sup>21</sup>
  - (z) Where its merits are not such as to commend it to universal acceptance.<sup>22</sup>
- (v) It is, in any case, not open to the courts of this country to introduce and enforce equities contradictory<sup>23</sup> to or in modification of the Statute Law.<sup>24</sup>
- (vi) It is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the principles of English Law. If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law.<sup>25</sup>
- (vii) Even in giving effect to Hindu and Mohammedan law of property and family law, equitable rules derived from the English Courts have been brought to bear on its development in the exigencies which have arisen in course of time.<sup>26</sup>

In view of the position explained above, it is necessary to attempt here a clear and precise survey of the origin and growth of equity in England.

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- 19. *Pattinson v. Bindhya Debi*, A.I.R. 1933 Pat. 196 ; *Naba Kumar Singh v. Fateh Singh*, A. I. R. 1935 Cal. 33.
  - 20. *Waghela Rai Singh v. Sheikh Masluddin*, (1837) L. R. 14 I. A. 89.
  - 21. *Balammal v. Palandi*, A. I. R. 1938 Mad. 164.
  - 22. *Sheo Ratan Singh v. Karan Singh*, A. I. R. 1924 All. 857.
  - 23. *Raja RamPal Singh v. Surendra Bikram*, A.I.R. 1937 Oudh 82.
  - 24. *Velayutha Chetty v. Govindasami*, (1910) 8 I.C. 364 (Mad).
  - 25. *Ajudhia Prasad v. Chandan Lal*, A. I. R. 1937 All. 610.
  - 26. *In re Kahandas Narrandas*, I. L. R. (188 ) 5 Bom. 154, 172-73. See Mayne, *Hindu Law*, 1938 ed , p. 88 and Tyaabji, *Mahomedan Law*, 3rd ed., p. 88 for further authorities.

## ORIGIN AND GROWTH OF EQUITY IN ENGLAND

### Introductory :

It is, indeed, difficult to decide at what stage the term common law which is a purely English term should be introduced to the readers. It is useless, at any rate to a great extent, to talk of or proceed to explain equity without having said anything of common law. But it is just or equally the same to understand anything of common law as such without knowing what is equity. Having given a brief introduction to equity it may perhaps be appropriate to explain the term common law before we proceed further with the consideration of equitable jurisdiction in England.

The general law of England is divisible into three parts which are distinguished as Statute law, Common law and Equity. Common law thus means all the residue of the general law of England after excepting Statute law and Equity.

Statute law is that portion of the law which is derived from the legislation or enactment of Parliament or the subordinate and delegated legislative bodies. It is called enacted or written law as opposed to unenacted or unwritten law.

Common law denotes the body of legal rules, the primary source of which was the general immemorial custom and which had its source mainly in the judicial decisions of the old Courts of King's or Queen's Bench, Common Pleas and Exchequer which had been established in England before the Court of Chancery or Equity came into existence in England.

Equity denotes the body of legal rules, the primary source of which was neither custom nor written law, but the imperative dictates of conscience and which had been set forth and developed mainly in the Court of Chancery.

The phrase common law is sometimes used in contradistinction purely to Statute law when it (common law) includes equity to denote the whole of the unwritten law, whether legal or equitable in its origin which does not derive its authority from any express declaration of the will of the legislature. At other times the term 'common law' is used in contradistinction to equity when the intention is to include the Statutory amendments under that term.

So in contrast with equity common law (or 'law' as it is in this context and for the sake of brevity called) means all law whether judiciary or Statute which would have been, before the fusion of these two Courts in 1873, administered by the Courts of common law as opposed to all law, judiciary or Statute, which would have been administered by the Court of Chancery only.

### Origin of Equitable Jurisdiction :

The causes which made a court of equity necessary in England were, as pointed out by Pomeroy<sup>1</sup>, the following :—

#### (1) Rigidity of Law as embodied in judicial precedents ;

1. Pomeroy's Equity Jurisprudence, Vol. I, 5th ed., p. 29.

- (2) Strict observance of arbitrary and technical forms ;
- (3) Adherence to institutions of Feudalism ;
- (4) Antipathy towards Roman Law ;
- (5) Earliest common-law actions and procedure.

For a clear understanding of these causes we must start with the establishment in England, of the first formal Court of Imperial Jurisdiction in the twelfth century. Under Henry I, an official was appointed, called the Justiciar, who seems to have combined in him the functions of Prime Minister, Lord Chancellor, Lord Chief Justice and Vice-Regent. This powerful personage was the President of a Court or Council formed of the Chief Barons connected with the Royal household, a court not merely of judicial character, but having three distinct functions. In the first place, it possessed consultative and (subject to the King's then paramount voice) legislative functions and in this form it still faintly survives in the modern Privy Council. In the second place, it acted as a Council of Finance, a function which subsequently devolved upon the new defunct, Court of Exchequer. In the third place, as a Supreme Court of Justice, it exercised both civil and criminal jurisdiction over the whole kingdom.

Naturally as civilization progressed, this union of duties was found to be inconvenient and the King's Court or Council was broken into two divisions and the purely legal work was assigned to certain members who formed what was called the *Aula Regis* or *Curia Regis* which became the foundation of the common law Courts. The separation of the *Aula Regis* from the King's Council had most important consequences in relation to English law. So long as justice was dispensed by the King in Council, that body, possessing legislative as well as judicial functions, was, it may be readily conceived, unfettered by strict rules and precedents, such as, naturally grow up in the congenial atmosphere of a professional court. Such a body could to some extent modify the law, and could at all events temper law with equity. When, however, the judicial functions of the Council were assigned to the *Aula Regis*, that Court could not, or at all events did not arrogate to itself any such powers. The Court, it may be supposed, must have been very conscious of this disability for the simple reason that it had, previously, this power and it was expressly taken away from it. It was merely the exponent of the law. It became professional and learned. Consequently, it became perhaps narrow and pedantic, clung over much to form and precedents and carried out its principles with uncomomprising logic even where by so doing, a grave injustice was inflicted.

Every jurisdiction in England exercised its authority under a delegation, either general or particular, from the King. The authority exercised by the courts of common law was conferred, whenever a controversy arose which called for adjudication, by a writ adapted to the circumstances of the controversy in question. This was known as an original writ. These writs were drawn up and issued by the Chancery, the great secretarial department. The Chancery was known as the *officina brevium* which has been translated as "the writ shop" since the plaintiff could not get a writ without paying for it. At the head of the Chancery was the Chancellor.

The Chancellor was an official first appointed by Edward the Confessor. He was chief of the King's secretaries and when the office of Justiciar was abolished by Edward I, he became the chief man in the kingdom and could,

in the words of Maitland, be called "the King's Secretary for all departments". He was generally, until 1529 A. D. an ecclesiast, learned in Roman Law.

Any one who wanted to begin an action at common law had, therefore, to go to the Chancery and obtain a writ. There were many writs had been formulated long ago. Such writs were writs of course and one could obtain them by asking for them of the clerks in the Chancery and paying the proper fees. It was the business of these clerks to hear and examine the petitions and complaints of the suitors and issue to them a writ, bearing the King's seal, fitted to their case.

The power to issue new writs came, in course of time, to be regarded as a power to make new law and a feeling arose that this power should be wielded by Parliament alone. The Provisions of Oxford, 1258, laid down that the Chancellor should seal no new writs, save writs of course, without the consent of the King in Council. The growth of original writs was thus arrested.

The Common Law Courts laid it down that every kind of civil injury must fall within the limits of some particular form of action and carrying this principle to its logical conclusion, held that unless an injury could be referred, to some forms of action (such as trespass, replevin, trover, debt and the like), the party was left without a remedy. Cases, therefore, frequently arose for which the common law gave no remedy at all. Thus, for instance, no contract could be enforced unless it created a certain debt or unless it was embodied in a sealed writing. No means was given for the legal redress of a wrong to person or property, unless the tortious act was accompanied with violence, express or implied. Such injuries and breaches of contract which now form the subject-matter of so much litigation were absolutely without any legal remedy.

An attempt to remove or improve upon the narrowness of the common law and the resultant failure in the administration of justice was made by the Parliament in the year 1285 through the Statute of Westminster II, known as the Statute in *consimili casu*. It empowered the Chancery to invent new writs for certain cases which were similar to those for which there were appropriate writs in vogue. But the Statute could not wholly realize its objective, because :—

- (i) it gave only a limited power and was confined to writs in *consimili casu* ;
- (ii) it provided for new forms of complaint and not for new forms of defence ;
- (iii) the power to invent and issue new writs was given to the Chancery but its validity was determined by the common law judges who did not adopt a liberal construction of the Statute and refused to accept innovations upon the established methods for the common law Courts.

The non-utility of the writs to expand or liberalise the common law may be stated in the very impressive expression of Dr. Hanbury : "The river of law whereof the Chancery was the source, flowed into a lock of which the common law judges were the keepers, and only a thin trickle came out on the other side."<sup>2</sup>

The common law Courts though a High Court of Justice were not

supreme, for the King reserved to himself in council the cognizance of all cases if the common law judges failed to do justice, and it is in this reservation (which the King discharged by delegation sometimes to his council and sometimes to his Chancellor), that we find the appellate jurisdiction of the House of Lords and the equitable jurisdiction of the Lord Chancellor. The failure of justice was attributable to (a) the weakness, partiality and corruption of the lower courts; and (b) the harshness and narrowness of the common law. These two led to the two distinct jurisdictions. The former which subsequently took the form of the notorious Star Chamber (established in 1487) now only survives in the jurisdiction of the Privy Council. The latter led to the jurisdiction of the Chancellor.

So, in cases where the common law gave no relief, a petition was made to the King-in-Council in exercise of his extraordinary judicial powers 'for the love of God and in the way of Charity'. These petitions were referred by the King to Chancellor. The Chancellor could, in such cases, invent new writs and so provide the complainant with a means of bringing an action in a court of law. But the courts of law had become very conservative and were given powers to quashing writs which differed in material points from those already in use. The other alternative which the Chancellor had and which he followed was to send for the complainant's adversary, examine him concerning the charge against him, decide questions of fact and law involved and then allow or dismiss the petition. In this way the Chancellor began to exercise his judicial functions. When such cases increased and the petitions became regular and constant, the practice was established in the reign of Richard II of addressing the suitors bills or petitions directly to the Chancellor and not the King or his Council. It is supposed impossible to fix the date at which the independent jurisdiction of the Chancellor first arose but its origin is generally sought in a proclamation of Edward III, in 1349 to the Sheriffs of London.<sup>3</sup> The Chancellor acted at first in the name of the King-in-Council, but, according to Sir William Holdsworth in the year 1474, a decree was made in his individual and exclusive authority and this practice continued thereafter. Thus arose the High Court of Chancery, dispensing what is technically known as 'equity' in contradistinction to common law.

### Early Description of Equity :

Equity of early days is very well described by Seldon's celebrated remarks : "Equity is a roguish thing. For law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor; as that is larger or narrower, so is equity. It is all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot, another a short foot. It is the same with the Chancellor's conscience".

It cannot be denied that in its inception Equity was no more than the idea of justice, entertained by the Chancellor for the time being very much in the same way as justice (or what passes for such) is administered by lay arbitrators in our own time. The exercise of jurisdiction by the earlier Chancellors was unfettered by any rules whatsoever. His duty was to do that "which justice and reason and good faith and good conscience require in the case". And of such requirements he was in each particular case to judge at his own pleasure. Thus we find Lord Chancellor Hatton, in the reign of Elizabeth saying: 'the Holy conscience of the Queen for matter of equity is, by Her

3. See Ashburner's Principle of Equity, 2nd ed., p. 21.

Majesty's goodness, in some sort committed to me, but the law is the inheritance of every man." As the Chancellor was invariably a priest down till Henry VIII's time, his notions of right and wrong were based rather on the religious notion of wrong to God than on the legal notion of wrong to man.

But how did the Chancellor's mind work? How did he arrive at a particular rule? Was there anything in particular to lead to the rules he evolved? All these enquiries are very neatly answered through the following observation of Maitland on the point:

"On the whole my notion is that with the idea of a law of nature in their minds they decided cases without much reference to any written authority, now making use of some analogy drawn from the Common Law, and now of some great maxim of jurisprudence which they borrowed from the canonists or the civilians."<sup>4</sup>

This may be characterised as equity of the ecclesiastical Chancellors and is marked, among other things, by the fact that in exercising his equitable jurisdiction the Chancellor did not consider himself to be bound by precedent. But this idea of equity could not continue for long.

Gradually the great office of the Chancellor came to be entrusted to a lawyer instead of an ecclesiastic and in due course there commenced that process of encroachment of established principle upon judicial discretion which marks the growth of all legal systems. By degrees the Chancellor suffered himself to be restricted by rule and precedent in his interpretation and execution of the dictates of the royal conscience.

#### Systematisation of Equity:

Cardinal Wolsey, Archbishop of York (1515 to 1529) was one of the last great ecclesiastical Chancellor. His successor, Sir Thomas More, Chancellor from 1529 to 1532, was the first of the "lawyer Chancellors of the modern type". After 1529 the office, with some unimportant or insignificant exceptions, went to a lawyer or professional man. The passing of the Chancellor's office from the ecclesiastics to the lawyers had a distinct mark on the development of equity in England and it has been correctly remarked that "To ecclesiastical Chancellors Equity owes its formation. To legal Chancellors it owes its transformation". The Chancellors, in exercising their equitable jurisdiction, began to develop a respect for precedents which made equity more and more settled and defined. Lord Ellesmere (1596-1617) is said to have started applying "the same principles in all cases, instead of following the whim of the moment under the name of conscience". The transformation of equity, however, began with Lord Nottingham (1673-1682) who has been deservedly styled as the father of equity. He made invaluable contribution towards the stabilisation and systematisation of the whole system and, as observed by Strahan,<sup>5</sup> "turned equity from matter of chance into matter of principle". To the names of these Chancellors must be added those of Lord Hardwicke and Lord Eldon. Lord Hardwicke who was Chancellor for nearly twenty years (1737-1756), after serving as Chief Justice in the Common Law Courts, owed to his civilian education a broad spirit of generalisation and excelled in extricating the leading principles of equity with a view to their application to concrete cases. Lord Eldon, also a former Chief Justice, and

4. Maitland's Equity, 1916 ed., p. 9.

5. Strahan's Principles of Equity, 5th ed., p. 9.

Chancellor at the beginning of the nineteenth century (1801-1806, 1807-1827), by the anxious care with which he examined the circumstances of each case in relation to principles, contributed to give to the rules of equity in the minds of the lawyers the like authority to that which attached to the rules of the common law.

The effect of precedents on the equitable jurisdiction of the Chancellor is very well illustrated by the case of *Roberts v. Wynn*,<sup>6</sup> where a bill was brought to set aside a will for fraud.

Lord Clarendon, with the Judges, was of opinion that the said will was obtained by great fraud and circumvention of the defendant Wynn, but by reason the precedents did not fully reach this case. The Court retained the bill for a year. The plaintiff petitioned the House of Lords who referred it back to the Lord Chancellor to decree for either party according to justice and equity, although no precedent should be found for that purpose.

The hold of precedents on the otherwise unfettered judgment of the Chancellor gradually became stronger and stronger.

Lord Macclesfield's opinion was "never to shake any settled resolution touching property or the title of land, it being for the common good that these should be certain and known, however ill-grounded the first resolution may be."<sup>7</sup>

In the beginning of the nineteenth century both Lord Eldon and Lord Redesdale insisted that Courts of equity were governed in their decisions by principles as fixed as those of common law. "I cannot", Lord Eldon remarked, "agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that equity of this Court varies like the Chancellor's foot".<sup>8</sup> Thus on to this extent the system administered in Chancery ceased to be a system of equity in the original sense and became the same in essence as the common law itself. The paradoxical remark of a great equity judge accordingly was: "This Court is not, as I have often said, a court of conscience, but a court of Law".<sup>9</sup>

This change in the attitude of equity has been characteristically summarised in the following two queries:—

"Has not equity in the last period of its transformation while saving its body, yet lost its soul? Have not equity long before 1873 ceased to be equity?"

The last new precedent openly made by the Chancellor was in the year 1848 in the well-known case of *Tulk v. Moxhay*.<sup>10</sup>

### Procedure in Equity :

A person seeking relief in a court of equity was called a suitor or petitioner. He commenced the proceeding by filing the petition or bill of complaint addressed to the Chancellor. The Chancellor considered the bill

6. (1663) 1 Ch. R. 236.

7. *Wagstaff v. Wagstaff*, (1714) 2 Peapt. Wms. 258.

8. *Gee v. Pritchard*, (1818) 2 Swans 402 at p. 414.

9. *Re-National Friends Assurance Co.*, (1878) 10 Ch. D. 118, 128 per Jessel, M. R. See also—*Re McArdle*, (1951) Ch. 669, 676, per Evershed, M. R. "But that is a matter of their conscience and not for this court".

10. (1848) 11 B. 571.

and ordered the adversary to come before him and answer the complaint. The writ whereby he did this was called a *sub poena*—because it ordered the defendant to appear under penalty or fine. When the defendant appeared in answer to the writ of *sub poena* he was in the earliest period of the jurisdiction, examined *viva voce* by the Chancellor. At a later date his answer was taken down in writing and filed with the bill. The defendant was sworn to his answer whether it was verbal or written. After the examination of witnesses, if and in so far as necessary, the Chancellor decided questions of fact as well as questions of law and then passed the order or decree. The order or decree did not by itself alter or affect the title to property. Aimed at purging the corrupt conscience of the party in question, it was directed against and bound his person only. The decrees were satisfied by compelling the parties to do or abstain from doing something—to execute a conveyance or release; to pay money, to deliver a chattel, to acknowledge satisfaction of a bond and the like.

Thus if A filed a bill claiming a property from B and the decision was in A's favour the decree instead of directly vesting the title in the property in A could be made effective only by ordering B to execute a conveyance in favour of A and if he refused to obey, the court attached him and sent him to jail till he did so. Similarly, where A had executed a bond for Rs. 5,000 in favour of B under conditions which were unconscionable and, therefore, invalid in the eyes of equity but not in that of the common law, the court of equity, instead of invalidating or rendering ineffective the bond itself ordered a release deed to be executed by B giving up the legal right or relieving A of the legal obligation.

All process of the Court of Chancery, from *sub poena* to the writ of execution of a decree, was issued under the Great Seal. Disobedience to a writ under the Great Seal was a contempt, punishable by the imprisonment of the offender until he cleared his contempt. Process confined to the person of the defendant was, however, often ineffective. The defendant might "walk so disguised" that it was impossible even for a serjeant-at-arms to find him; he and his family and servants might resist the serjeant-at-arms by force, and when he was found and captured and in the Fleet, he might refuse to execute the order of the court.

In the sixteenth and seventeenth centuries the Court did not shrink from the strongest medicines to relieve a corrupt conscience. It confined the defendant to his cell, boarded up the windows of his cell or put him in irons. But the defendant often preferred to suffer these inconveniences than to obey the orders of the court, and it was found that compulsion of the property was more successful than compulsion of the person. Abandoning its strict doctrine, the Court, therefore, began to proceed against the property of the parties as well. The most important change in this sphere was the introduction and development of sequestrations.<sup>11</sup>

## DIVISIONS OF EQUITY JURISDICTION

Justice as administered by the Court of Chancery has been classified under three heads :

11. It is writ or commission directed to certain persons nominated by the person prosecuting the judgment and empowering them to enter upon the real estate of the disobedient person and receive the rents and profits thereof, and take chattels, and keep them in their hands, until he performs the act required. The sequestrators are officers of the court and are bound to account for what they receive.



- (i) in cases where the common law gave no relief ;
- (ii) in cases where the common law did not afford adequate relief, at least without great delay or circuitry ;
- (iii) in cases where its peculiar procedure enabled it to obtain evidence, not capable of being obtained by the Courts of common law.

Each of these gradually came to be denominated by a specific name, viz. :  
 (i) the exclusive jurisdiction ; (ii) the concurrent jurisdiction and (iii) the auxiliary jurisdiction.

#### **The exclusive jurisdiction :**

The exclusive jurisdiction covered cases wherein the common law did not recognize the right and as such gave no relief at all though conscience required that the right should be recognized and the relief given. The most important branch of this jurisdiction, undoubtedly, was the rights of persons claiming under trusts. If, for example, A transferred property to B for the use or benefit of C, B became the absolute owner of the property at common law and he committed no legal wrong if he abused the confidence by using the property otherwise than for the benefit of C. C, therefore, could not get any relief at common law. This was unconscionable and the Court of Chancery intervened by recognizing B's right or interest in the property and giving him the relief in case of an encroachment.

Next in importance were the rights of married women in relation to property given to them for their separate use, which, as recognized in equity, were entirely different to the spirit of common law. The equitable jurisdiction in reference to mortgages, penalties and forfeitures was another important head of equity and the administration of assets of testators and intestate may be taken to complete the list of the more important heads of the old exclusive jurisdiction.

In all these cases the common law did not recognize the equitable right or interest and failed to give any relief. Equity, therefore, had the exclusive cognizance of these cases and hence the name exclusive jurisdiction.

#### **The Concurrent Jurisdiction :**

The concurrent jurisdiction of equity, unlike the exclusive, was concerned with common law rights, but imposed in cases where the common law did not afford adequate relief. Such cases usually fell under the heads of actual (or as it is sometimes called express) fraud, accident, mistake, partnership, recovery of specific chattels, specific performance of contracts, set-off, dower and partition, in all of which the common law Courts recognized and defined the rights of the parties but, owing to its peculiar procedure, could not give effect to those rights in an appropriate way.

Thus the Court of Chancery in exceptional cases ordered the delivery of chattels where the remedy on an action of detinue at common law was inadequate and this remedy was regularly given in the case of heirlooms and title-deeds. The court also enforced regularly the specific performance of contracts for sale and purchase of land where, at law, a party could obtain only damages for breach of contract. In these cases the jurisdiction was based on the inadequacy of the legal remedy ; and, therefore, where a plaintiff sought specific performance but it appeared that he would be adequately compensated in damages for a breach of the contract, the court refused to give him relief.

In such matters the nature and extent of the rights depended exclusively on legal principles and being recognized both in Courts of Law and in the Court of Chancery, they could be enforced either by legal or equitable remedies : but before an equitable remedy could be given it had to be shown that the right had been or was about to be violated in such a way as would compel a Court of Law to grant the legal remedy, if the complainant had applied for it. This very important characteristic of the concurrent jurisdiction may be illustrated by the case of *Colls v. Home and Colonial Stores Limited*.<sup>12</sup>

The act of which the plaintiff complained was an interference with the ancient lights of his house. The right to lights is a legal right, but it is usually enforced by an equitable remedy—that is, by an injunction to restrain the defendant from interfering with the light. Now, at common law to constitute an actionable interference with the right, it must be shown that not merely has the defendant obstructed the light, but that he has obstructed it so gravely as to make the obstruction something in the nature of a nuisance. The Court of Appeal, forgetting that it was merely enforcing a legal right, held that in equity any interference whatever with the right to light could be restrained, and granted the plaintiff an injunction, though the obstruction of his light was not such as would amount to an actionable wrong at common law.

On appeal, it was held by the House of Lords that where the matter was within the concurrent jurisdiction an equitable remedy could be granted only where a legal remedy would lie if the plaintiff had sought a legal remedy ; and as in this case the plaintiff could not have recovered damages, he could not obtain injunction.

In all cases coming under the concurrent jurisdiction, the Court of Chancery determined for itself the validity of the legal rights which it was called upon to enforce through an equitable remedy. It was called concurrent jurisdiction, because cases falling under this head were cognizable both by the Common Law Courts and the Courts of Chancery.

#### The Auxiliary Jurisdiction :

In matters within the auxiliary jurisdiction of equity the nature and extent of both the rights and the remedies depended exclusively on legal principles, and with regard to them equity intervened merely to supply the defects of legal process so as to enable the Courts of Law to give effectively the legal remedies. Herein the Court of Chancery simply lent its assistance to the litigants in Common Law Courts towards the enforcement of a legal right through a legal remedy. Ashburner splits auxiliary jurisdiction into two classes :—

- (i) Those wherein the jurisdiction of the Court was exercised by a judgment which affected or might affect the property, the subject-matter of the suit. The guiding principle in these cases was either to prevent a multiplicity of suits (Bills of peace or Interpleader) or to prevent an irreparable injury (Injunction). In these cases the Court of Chancery did not itself adjudicate upon the validity of the plaintiff's claim. That adjudication was made by the Courts of Common Law ; but the assistance of the Court of Chancery was sought either before the adjudication to keep matters in *status*

12. (1904) A.C. 179.

*quo* until the rights of the parties could be determined at common law or after the adjudication, to give a more complete remedy to the party in whose favour it had been made than he could obtain at common law.

Where a man set up a general exclusive right at common law and the persons who controverted it with him were so numerous that he could not quiet the right by one or two actions at law, he was entitled to file a bill of peace against some of his opponents sufficient in number to provide for a fair trial. The Court of Equity then directed an issue to determine the right and, if the issue was determined in favour of the plaintiff, the court made a declaration of his right. The same procedure applied where a number of persons claimed one and the same right against one man. When a person was in possession of property in which he claimed no interest, but to which two or more other persons laid claim, and he, not knowing to whom he could safely give it up, is sued by one or both, he could compel them to interplead. i. e. to take proceedings between themselves to determine who is right.

- (ii) Those cases in which the Court of Chancery merely cleared the way for proceedings, whether contemporaneous or subsequent and whether in its own or in another jurisdiction. In these cases the plaintiff in equity asked no relief by his bill and no judgment was pronounced by the Court which could affect the rights of the parties. This jurisdiction consisted of three branches.—Discovery, perpetuation of testimony and examination of witnesses *de bene esse*.

Thus, in law a person who broke a legal contract was liable in an action for damages for the breach. But where to prove the contract it was necessary to produce documents in the hands of the person guilty of the breach, the common law courts could not secure this. The Court of Equity could, and so in such cases it ordered discovery of documents and when these were produced the action for damages could proceed.

Where the testimony of witnesses was in danger of being lost before the matter to which it related could be made the subject of judicial investigation, the Court of Chancery lent its aid to preserve and perpetuate their testimony.

Courts of equity also, where an action was pending at common law, entertained a suit to examine old and infirm witnesses who were likely to die before the time of trial could arrive, or even to examine a witness who was neither old nor infirm if he was the only witness to support the parties.

It was called auxiliary jurisdiction because it was exercised "in aid" (i. e. *in auxilio*) of the common law. Herein the Court of Chancery merely assisted the parties in securing the legal relief for the violation of a legal right.

Strahan has rightly summed up the classification of equity jurisdiction in the following manner :—

"where the right to be enforced and the remedy sought were both equitable, the matter was within the exclusive jurisdiction, where the right to be enforced was legal, but the remedy sought was equitable, it was within the concurrent jurisdiction, where both the right to be enforced and the remedy sought were legal and equity only intervened to help

the plaintiff to get the legal remedy, it was within the auxiliary jurisdiction."

Maitland has not approved of the classification, which pre-supposes a logical scheme but equity does not conceive of such a scheme. It is suggested that "Equity is a collection of appendices between which there is no very close connection". Moreover such classification has become meaningless in modern times.

## EQUITY AND THE COMMON LAW

### Distinctive Features of Equity and Common Law :

These may be summarised as follows :—

1. A person seeking relief in a Court of Law was called a plaintiff in personal actions and a defendant in real actions. On the other hand, a person seeking relief in a court of equity was called a suitor or petitioner.
2. In a Court of Law, the plaintiff *claimed* the benefit to which he was by law entitled. All that the Court had power to do was to decide if his claim was good by law. Once it decided that his claim was good at law, it was compelled to grant him relief according to law. In a court of equity, on the other hand, the petitioner *humbly prayed* the benefit of the Court's grace. He asked for something which the law did not allow him and which the King alone could give him by the voluntary exercise of his prerogative entitling him when he thought proper to interfere and grant relief outside the law. Equitable relief could not, therefore, be claimed as of right and was and continues to be in the discretion of the Court.
3. In a Court of Law, the plaintiff's conduct in the matter did not affect the legal relief if he was otherwise entitled to it. The equitable relief, on the contrary, depended upon the petitioner's conduct and the Court of Equity refused its aid if the conduct was unconscionable or imposed upon the relief a condition precedent or subsequent.
4. Common law is derived from feudal customs while equity is derived from Roman and Canon law.<sup>13</sup>
5. The procedure in the court of equity which was borrowed from ecclesiastical courts also showed a contrast from that in common law. At law the defendant was told the cause of action against him and was summoned to submit his answer to it. The *sub poena* of the court of equity, on the other hand, merely told the adversary that he has got to come before the Chancellor and answer the complaint made against him. When he appeared before the Chancellor he was to answer on oath, and sentence by sentence, the bill of the plaintiff.
6. The judgments of a Court of Common Law altered the legal title to the property in question as between the parties to the action. The orders and decrees of the Court of Chancery bound the

13. Maitland's Equity, 1916 ed., p. 14.

person only. In equity, therefore, the legal title was transferred, not by the act of the Court but by the conveyances made by the parties under orders from the Court.

7. The Courts of Common Law dealt with both civil and criminal matters while the Court of Chancery dealt only with civil matters.

#### Relation of Equity with Common Law :

Maitland says : “.....we ought to think of equity as supplementary law a sort of appendix added to our Code, a sort of gloss written round our code, an appendix, a gloss, which is to be administered by courts specially designed for that purpose.....”. The question, however, remains : How did the appendix or gloss co-ordinate with or react upon the code ? Did it fill in merely the gaps in the Code or did it come in even where there was no void at all and if it so entered in that sphere also did it merely illucidate the existing rule or set itself against and above them ?

Divergent views have, however, been expressed with regard to the relation of equity with Common Law.

Maitland's fundamental postulate is that equity is not in conflict with law. He starts by quoting Blackstone's assertion that every definition or illustration which draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree, and then puts forward his own view as follows :

“.....the first thing that we have to observe is that this relation (between law and equity in or before 1875, *i. e.* before the Judicature Act) was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every title of law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require. Of course, now and again there had been conflicts : there was an open conflict, for example, when Coke was for indicting a man who sued for an injunction. But such conflicts as this belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously.

“We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient systems ; at every point it presupposed the existence of common law.”<sup>14</sup>

On the other hand, Professor Hohfeld took the view that “while a large part of the rules of equity harmonised with the various rules of law, another large part of the rules of equity—more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity—conflict with legal rules and, as a matter of substance, annul or negative the later *protanto*”.<sup>15</sup>

Similar but more emphatic and clearer is Pomeroy's view on the subject :—

“In the commencement of the jurisdiction and down to a time when the principles of equity as they now exist had become established,

14. Maitland's Equity, 1916 ed., p. 14.

15. Fundamental Legal Conceptions. p. 121.

every decision made by the Chancery, every equitable doctrine which it declared, every equitable rule which it announced, was of necessity an innovation to a greater or less extent upon the then existing common law, sometimes supplying defects both with respect to primary rights and to remedies which the law did not recognize, and sometimes invading, disregarding and overruling the law by enforcing rights or conferring remedies with respect to which the law was not silent, but which it actually denied and refused. The very growth of equity, as long as it was in its formative period, was from its essential nature an antagonism to the common law, either by way of adding doctrines and rules which the law simply did not contain or by way of creating doctrines and rules contradictory to those which the law had settled and would have applied to the same facts and circumstances. It would be a downright absurdity, a flat contradiction to the plainest teachings of history to deny that the process of building up the system of equity involved and required on the part of the Chancellors an invasion, disregard, and even open violation of many established rules of the common law.

"Sir William Blackstone.....goes to the extent of denying that equity has or ever had any power to correct the common law or to abate its rigour. This is one example among many of Blackstone's utter inability to comprehend the real spirit and workings of the English law."<sup>16</sup>

Dr. Hanbury says that "The difference between Maitland and Hohfeld is really one of emphasis"<sup>17</sup> and himself seeks to establish that the true relation between equity and law is to be found in a compromise between the two views.

\* If the difference in the above views on the subject is, as it appears to be, one of emphasis alone depending on the individual zeal justifying the system or warding off the criticism, the true relation is and ought to be found not in a compromise between the two views but in a correct reading or estimation of the two views.

It is not possible to maintain that there was no conflict between equity and the common law. The very need or object of equity was to do something which the common law refused or failed to do. This could not be achieved unless equity evolved a principle or rule opposite, directly or indirectly, in form as well as substance or in substance alone to that existing under the common law. Thus there were many cases wherein the Court of Chancery had to decide on contradictory principles. At law, for example, a trustee or mortgagee under a forfeited mortgage was treated as the absolute owner of the property in question. The court of equity recognised with regard to the same property a right in the beneficiary or the mortgagor. A right is correlated to a duty and the obligation imposed upon the trustee or mortgagee in equity entrenched upon and squeezed out his common law right.

It is true that even in these cases the Court of Chancery professed to follow the common law. The Chancellor said that where the common law recognized or adjudged a right in a person which, under the circumstances of the case, would be unfair or unconscionable for him to enjoy, claim or enforce, we do not ignore nor do we override the law, but only deprive him

16. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 1, pp. 62-63.

17. Modern Equity by H. G. Hanbury, 2nd. ed., p. 93.

of the legal benefit with a view merely to correct his corrupt conscience. The position with regard to the case of trust may be illustrated in expression of Maitland :

"Equity did not say that the *cestui que trust* was the owner of the land ; it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*....."

"The language which equity held to law, if we may personify the two, was not, 'No that is not so, you make a mistake, your rule is an absurd, an obsolete one'; but 'yes, of course that is so, but it is not the whole truth. You say that A is the owner of this land ; no doubt that is so, but I must add that he is bound by one of those obligations which are known as trust.'"<sup>18</sup>

Similarly, the Court of Chancery instead of saying that a property vesting in A at law belongs, on equitable grounds, to B, compelled A to make a voluntary transfer of the same to B. In the same way Courts of equity restrained persons from commencing or pursuing proceedings at common law or from taking out execution of judgments which they had obtained at common law, if the opposite party had an equity against them. And all this to purge a corrupt conscience on account of something which the law of the land allowed and sanctioned.

In this way, *i. e.* by aiming at and proceeding against the person equity, no doubt, avoided a direct collision with common law, but it would not be correct to say that there was no conflict between equity and common law.

The attitude of the common law Courts towards equity was also remarkable from another point of view. The Courts of common law, in exercise of their jurisdiction, ignored not only the doctrine but also the existence of the Court of Chancery. It was no justification in law of an act that it had been done under the authority of a Court of equity. Thus, if an executor made payments under a decree of the Court of Chancery, the decree could not be pleaded or given in evidence in an action brought at law by a creditor of the testator.

The old relation between equity and common law is illustrated by the following practice :

A Court of equity could not release from prison a debtor who had been taken in execution at common law, although the Court was satisfied that he was entitled, on equitable grounds, to be relieved from liability. Its only weapon was to imprison the creditor until he released his debtor, and it sometimes happened, if the creditor was obstinate, that while the debtor was in prison on an execution issued by the creditor, the creditor was himself in the Fleet<sup>19</sup> for contempt of a decree in equity.

It is important to refer in this connection to the bitter controversy<sup>20</sup> between Lord Coke, the Chief Justice and Lord Ellesmere the Chancellor with regard to the indictment of a man who had obtained an injunction from the Chancery. The matter reached a deadlock and the King, James I, intervened

18. Maitland's Equity, 1916 ed., pp. 17, 18-19.

19. Prison where the prisoners of the Court of Chancery were confined.

20. Oxford's case, (1615) 1 Ch. Rep. 1.

and gave a decision in favour of the equitable jurisdiction. He issued the following order :

"We do will and command that our Chancellor or Keeper of the Great Seal for the time being shall not hereafter desist to give unto our subjects, upon their several complaints now or hereafter to be made, such relief in equity (notwithstanding any proceedings at common law against them) as shall stand with the merit and justice of their cause, and with the former, ancient and continued practice and presidency of our Chancery."<sup>21</sup>

It is, therefore, clear that the "no-conflict" formula with regard to the relation between common law and equity cannot stand. It is, however, essential to note that the conflict continued only so long as equity was in its formative period and, as observed by Maitland, ".....for two centuries before the year 1875 the two systems had been working together harmoniously"<sup>22</sup>. The relationship of equity and the common law during the post-formative stage of equity has been very well explained in the following words :

"The Chancellorship of Sir Heneage Finch Lord Nottingham (1673-1682) is usually taken as the starting point of the new era. To him tradition deservedly gives the title of the Father of Modern equity. The reputation enjoyed in common law circles by Chancellors selected from among most distinguished lawyers put an end to the rivalry. A *modus vivendi* was tacitly arranged. Common law and Equity retained their respective positions, like two armies suddenly checked in a hostile move, and thenceforward stationary behind two lines of trenches. The front was stabilised. Behind the lines the work of mining and organisation went on. The situation resembled an armistice, preceding a definite peace, never perhaps to be reached."<sup>23</sup>

### FUSION OF THE ADMINISTRATION OF EQUITY AND COMMON LAW.

#### Abuses of the Double System of Administration of Justice :

In most systems of judicial organisation, the distribution of contentious matters between the different courts is, as a rule, determined either by the importance of the controversy from a pecuniary or other standard, or by the nature or locality of the subject-matter in dispute, or by the domicile or status of one or both of the parties. In England, till the year 1873-75 the distribution was based upon a different principle. Instead of the whole administration of municipal justice being confided to one and the same class of Courts without any discrimination between law and equity, there were two distinct Courts, one class or set of which acted on the principles of common law while the other on the principles of equity.

Story expressed his approval of the divided jurisdictions of the common

21. July 26, 1916.

22. Maitland's Equity, 1916 ed., p. 25.

23 The English Legal Traditions by Henry Levy-Ulman translated by Mitchell, 1935 ed.



law Courts and the Courts of Chancery and quoted, in support, Lord Bacon, as having ".....upon more than one occasion, expressed his decided opinion that a separation of the administration of equity from that of the common law was wise and convenient".<sup>24</sup>

It may, nonetheless, be stated as the accepted view that the double jurisdiction gave rise to grave inconveniences. A commission appointed in 1850 reported that the mischiefs which arose from the system of two distinct classes of Courts proceeding on distinct and, in some cases antagonistic principles, were extensive and deep rooted. Common law Courts did not recognize the rules or the decrees of equity and in many cases the Courts of equity did not, *in effect*, recognise the common law or its judgments. A controversy could not, therefore, be concluded by a single adjudication between the parties. A plaintiff who had obtained a judgment in his favour in a Court of law might be prevented from enforcing it by an injunction granted by the Court of Chancery if in the opinion of the latter it would be inequitable. No Court had full power to grant all or any of the available reliefs. The parties, in most cases, were driven from one Court to another before they could obtain a final adjudication. For example, in matters falling within the auxiliary jurisdiction it was necessary to bring proceedings both in a common law Court and in Chancery to have the matter disposed of completely and finally.

These hardships were obviated to some extent :

Firstly, through an attempt by the Courts themselves to cross the barrier erected between time. The common law Courts in the administration of common law showed an inclination to recognise equitable principles instead of disregarding them altogether and leaving the parties in all cases to resort to the proceedings in the Chancery Courts for any equitable claim. The following observations from the common law judges clearly indicate the tendency in question.

"Formerly the Courts of law did not take notice of an equity or a trust..... but of late years it has been found productive of great expense to send the parties to the other side of the Hall ; wherever this Court has seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection."<sup>25</sup>

"The common law of the land is the birth right of the subject, under which we are bound to administer him justice, without sending him to his writ of *sub poena*, if he can make that justice appear".<sup>26</sup>

Similarly, the Court of Chancery in many cases determined in substance the legal rights of the parties instead of leaving or directing them to be decided exclusively by the common law Courts in a separate proceeding.

Secondly, through legislative enactments designed to incorporate the equitable principles into that of law and *vice versa*.

Thus in 1858, was passed the Chancery Amendment Act known as

24. Story's Equity Jurisprudence, 3rd ed., p. 21.

25. Per Ashhurs, J. in *Winch v. Keeley*, (1787) 1 T. R. 619, 622.

26. Per Buller, J. in *Master v. Miller*, (1791) 4 T. R. 320, 344.

Lord Cairns Act, which conferred on the Chancery Courts the power of awarding damages—a power which was till then exercised by the common law Courts only. Similarly, certain equity powers were given to the common law Courts. Section 79 of the Common Law Procedure Act, 1854, for instance, conferred on the common law Courts a limited power of granting injunctions in certain cases.

### The Judicature Act, 1873-1875 :

The trouble could not be eradicated by a few chinks here and there in the invincible dam erected or existing between the administration of justice by the Courts of common law and that of equity. It had to be demolished altogether so that whatever and wherever the Court, it could have the benefit and burden of both the streams. This was secured by the Judicature Act of 1873 which came into force on 1st November, 1875. These together with the subsequent amended Acts have been repealed and replaced by the Supreme Court of Judicature (Consolidation) Act, 1925.

By the Judicature Acts the old Courts of common law, Chancery and Probate *etc.* were united and consolidated into one court called the Supreme Court<sup>27</sup> of Judicature possessing the jurisdiction formerly exercised by all the courts collectively. The Supreme Court consists of the High Court of Justice with a Court of Appeal above it. The High Court of Justice was divided into five divisions :—

(i) Chancery, (ii) Queen's Bench, (iii) Common Pleas, (iv) Exchequer and (v) Probate, Divorce and Admiralty. Of these the Common Pleas and the Exchequer Divisions were abolished by an order in Council in the year 1880.

Different causes and matters have been assigned to these divisions of the High Court. Most of the equitable matters dealt with by the old Court of Chancery are assigned to the Chancery Division. The Queen's (or the King's) Bench Division mostly deals with matters which formerly came before the common law Courts. Similarly, the Probate, Divorce and Admiralty Divisions of the High Court exercise jurisdiction in matters formerly within the exclusive cognizance of the court of Probate, the Court of Divorce and Matrimonial causes and the High Court of Admiralty. It is, however, very important to note that these divisions have been made for the purpose of mere convenience in the despatch of business, and a judge to whichever division he may belong, in exercising his jurisdiction over matters assigned to that Court, must, unlike the earlier ones, recognise and give effect to all the rights, obligations and defences, be they legal or equitable.

The Judicature Act was mainly a reform in adjective law, but in certain points, where conflict existed or was believed to exist, it made alterations in the substantive law as well. These alterations were made by Section 25, the first ten sub-sections of which<sup>28</sup> established an uniform rule on specific topics<sup>29</sup>

27. Its title 'Supreme' is a misnomer, as the superior appellate jurisdiction of the House of Lords and Privy Council, which was originally intended to be transferred to it has been allowed to remain.
28. Subsequently repealed but mostly re-enacted in the Property Acts of 1925.
29. Administration of insolvent estates, application of Statutes of Limitation, waste, merger, mortgages, assignment of choses in action, etc.

while the eleventh<sup>30</sup> was residual providing for cases possibly overlooked and laying down the rule :

“Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.”

The effect of this clause may be illustrated by the case of *J. b v. Job*<sup>31</sup>, where the question was whether an executor is liable for the assets of a testator which have come into his hands and have afterwards been lost to the estate without his fault. At law the executor used to be liable, but in equity he was not liable unless the loss was caused by his wilful default. It was held that the equitable rule is now the rule of law also.

On the whole the clause, as observed by Maitland, “has been practically without effect”<sup>32</sup> or as observed by Dr. Hanbury : “its *direct* effect has been infinitesimal, simply because there are so very few cases where there is any conflict between equity and common law”.<sup>33</sup>

The clause, however, only applies to principles and not to practice. Where there was a difference, before the Judicature Act, in the practice of the two courts, the more convenient practice is now followed.<sup>34</sup>

#### Object and effect of the Judicature Act :

“The main object of the Judicature Act,” in the words of Lord Watson, “was to enable the parties to a suit to obtain in that suit and without the necessity of resorting to another Court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid multiplicity of legal proceedings”.<sup>35</sup>

It is sometimes said that the Judicature Act fused law and equity into one harmonious whole. This is altogether inaccurate. The object of that Act was neither to fuse nor to confuse the principles which govern equitable rights and remedies with those which govern legal rights and remedies. The Act did not fuse together law and equity ; it only fused together the Courts which administered law with the Courts which administered equity.

Jessel, M.R., in *Salt v. Cooper*<sup>36</sup> has very correctly remarked that “the main object of the Judicature Act, 1873 was to assimilate the transaction of equity business and common law business by different courts of judicature. It has been sometimes inaccurately called ‘the fusion of law and equity’ but it was not any fusion or anything of kind, it was vesting in one Tribunal the administration of law and equity in every cause, action or dispute which should come before the tribunal. That was the meaning of the Act”.

The two streams of jurisdiction, as very aptly remarked by Ashburner, have met and now run in the same channel, but their waters do not mix. The

30. Now contained in S. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925.

31. (1877) 6 Ch. D. 562

32. Maitland's Equity, 1916 ed., p. 16.

33. Modern Equity by H. G. Hanbury, 2nd ed., p. 19.

34. New Biggin Gas Co. v. Armstrong, (1879) 13 Ch. D. 310.

35. Ind. Coop. & Company v. Emmerson, (1887) 12 App. Cas. 300, 308.

36. (1880) 16 Ch. D. 544.

distinction between a legal and an equitable right or relief, as would be evident from the relevant maxims discussed in Chapter V, still subsists and continues to have a great practical importance, as may be seen from the following :—

A legal claim can only be met by a legal defence or by some equity available to the defendant which, before the Judicature Act, would have moved a Court of equity to restrain the plaintiff at law either from proceeding with his action or from enforcing his jurisdiction. A legal claim is not, apart from the operation of a Statute of limitations, determined merely by the lapse of time. On the other hand, equitable claims cannot be enforced against a legal title, which they have no ground in conscience to remove ; they may be met by several defences which have no operation against a legal claim ; and they may be lost by mere inaction for a period of time varying in length with the nature of the claim. Similarly, the granting or refusing of legal remedies does not, as before, depend upon the discretion of the court and a legal claimant cannot be put on equitable terms. But the remedies given in equity continue to be in the discretion of the court and are subject to equitable conditions or terms.

The Judicature Act has practically done away with the auxiliary jurisdiction and it is no longer necessary for a litigant to institute a suit in equity in order to obtain evidence which he wants to use in an action at law. It has further converted the exclusive into concurrent jurisdiction since every Court to which a suit may be brought is competent to grant all necessary relief, be it legal or equitable or both. "The Court is not now a Court of law or a Court of equity but it is a Court of complete jurisdiction"<sup>37</sup>. It is no longer necessary or possible for a judge to say to a litigant "you are relying on a trust and this Court can take no notice of a trust," or "This is a matter of pure common law and not within the cognizance of a Court of equity."

#### Definition of Equity in Relation to English Law :

The Chapter would be incomplete without a definition of equity with special reference to English law. Although, as generally agreed,<sup>38</sup> it is not possible to evolve a satisfactory definition of equity in its technical sense, the following definitions or descriptions of equity may be chosen to represent some of the salient features of equity under the English legal system :

"Equity means a claim to the interposition of the Court of Chancery and it is no less equity because the aid of Chancery is sought to protect a legal right".—*Wadsworth, J.*<sup>39</sup>

"Equity is a body of rules, the primary source of which was neither custom nor written law, but the imperative dictates of conscience and which had been set forth and developed in the Court of Chancery".<sup>40</sup>—*Henry Levy-Ulman.*

"Equity.....in its technical sense, may be defined as a portion of natural justice which, though of such a nature as properly to admit of

37. *Pugh v. Heath*, (1882) 7 App. Cas. 235, 237.

38. *Snell's Principles of Equity*, 24th ed., p. 9.

39. *Ranga Rao v Rama Chandra Rao*, A.I R. 1941 Mad. 91.

40. *The English Legal Traditions* by Henry Levy-Ulman, Translated by Mitchell, 1935 ed.

being judicially enforced, was, from circumstances hereafter<sup>41</sup> to be noticed, omitted to be enforced by the Common Law Courts—an omission which was supplied by the Court of Chancery”.—*Snell*<sup>42</sup>.

“Equity jurisprudence may.....properly be said to be that portion of remedial justice which was exclusively administered by a Court of equity as contradistinguished from that portion of remedial justice which was exclusively administered by a court of common law”.—*Story*.<sup>43</sup>

“Equity *now* is that body of rules administered by our English Courts of justice which, were if not for the operation of the Judicature Acts, would be administered only by those Courts which would be known as Courts of Equity”—*Maitland*.<sup>44</sup>

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41. Which heretofore has been covered in this book.
42. *Snell's Principles of Equity*, 20th ed., p. 2.
43. *Story's Equity Jurisprudence*, 3rd ed., p. 16.
44. *Maitland's Equity*, 1916 ed., p. 1.

## NATURE OF EQUITABLE RIGHTS AND INTERESTS

The existence of the double system of the administration of justice in England before the Judicature Act, 1873-1875 led to the creation of a double system of rights and interests—legal and equitable.

Such of the rights and interests which received recognition and protection or enforcement from the common law Courts are called legal rights and interests while those that were recognized and protected or enforced by the Court of Chancery only are called equitable rights and interests.

As an example of an equitable right may be mentioned what was known as 'wife's equity to settlement,'<sup>1</sup> i. e., the wife's right for a reasonable provision for her and her children by the husband as against his common law rights in the wife's property.

When the subject-matter of an equitable right is definite property the person entitled to the right is said to have an equitable interest in the property. So if A mortgaged his properties to B with the condition that if A failed to pay back the debt together with interest within two years he would forfeit all his interest in the mortgaged property and if two years elapsed without such payment, A, in view of the common law Courts, lost all his interest in the property. In other words, A had no legal interest in the property after forfeiture. The Courts of Chancery, on the other hand, allowed A to recover his property from B by payment of the debt together with the interest and the other expenses even after the stipulated period of two years. A's interest in the property under the forfeited mortgage is an equitable interest since it was recognized in and enforced by the Court of Chancery only.

English Law, accordingly, came to have duplicate or two kinds of estates—legal estate and equitable estate.

Estate usually signifies (i) the condition or circumstance in which a person stands with regard to property in which he has an interest, and, by extension, (ii) the interest itself. In this sense, "estate" means certain varieties or modes of ownership, especially in land. It may be legal or equitable.

A legal estate is a limitation of interests in reality which gives a party a right at law to the ownership and profits. Equitable estate is such an interest as was recognized in equity only. It is beneficial ownership as distinct from legal seizing.

So, in the case of a property subject to a trust, the trustee has the legal estate and the beneficiary has the equitable estate in the trust property.

So also where a valid contract has been made for the sale of land, the equitable estate in the land passes at once to the purchaser, although the legal estate remains in the vendor until actual conveyance has been executed.

### Nature of Equitable Interests :

The Court of Chancery, as stated earlier, had its origin *inter alia* in the

1. See Chapters V and IX.

failure or inability of the common law Courts to recognise and protect certain rights and interests which, when they received the equitable sanction, become equitable rights and interests. It is important to note the following characteristics of equitable rights and interests :

1. Equitable rights were created primarily for one or the other of three purposes : (i) to protect confidences, (ii) to promote fair dealing and (iii) to prevent oppression.
2. "An equitable right arises when a right vested in one person by the law should, in the view of equity, be, a matter of conscience, vested in another".<sup>2</sup> "Practically equitable rights.....are merely extensions and modifications of legal rights over property."<sup>3</sup>

An equitable interest is merely an interest affecting the conscience of the legal owner. If the legal owner obtained his title in such a way that his conscience is not affected by the equitable interest, he is in no way bound by it.

3. The general<sup>4</sup> rule is that equity follows the law and that equitable interests have in general the same incidents and attributes as have corresponding legal interests. They devolve and can be settled, mortgaged and disposed of precisely in the same way as legal interests.
4. Equity follows the law and as such a legal estate or interest takes precedence over the equitable estate or interest. In case of a conflict between the legal owner and a person entitled to an equitable interest, the rule of decision is contained in the maxim "where equities are equal, the law prevails".<sup>5</sup>
5. As among different equitable estates or interests, the deciding rule is expressed through the maxim : "where equities are equal, the first in time prevails."<sup>6</sup>
6. The most important characteristic of an equitable interest specially in contrast with the legal interest is, to some extent, entangled in a controversy and depends upon the answer to the question : Are equitable rights and interests, like legal rights and interests, *jura in rem i. e.* rights against the world at large or are they *jura in personam i. e.* rights only against certain persons ?

Equitable interest can be distinguished from mere equities". Equitable interest may be said to be an actual right of property much as interest under a trust, a mere equity is not a right of property but a right, usually of a procedural nature, which is ancillary to some right of property.<sup>6a</sup> The right to set aside the transactions for fraud or undue influence or to rectify a document for mistake are the instances of mere equities.

There are two schools of thought on the matter which may, in the expression of Dr. Hanbury<sup>7</sup>, be called the "personalist" and the "realist"

2. Strahen's Digest of Equity, 5th ed., p. 21.

5. Ibid, p. 23.

4. See Chap. V on this maxim for the exceptions.

5. See Chap. V for a discussion on this maxim.

6. See Chap. V for a discussion on this maxim.

6a. See National Bovine Bank, Ltd. v. Ainsworth, (1965) A. C. 1175 at 1238.

7. Essays in Equity, p.

schools—attributing the corresponding incidents to the equitable interests. The truth, however, lies somewhere between the two extremes. The correct position may be best stated through a very clear survey of the position by Mr. Megarry :

“It (the right of the beneficiary against the trustee) was a right *in personam* enforceable against T (the trustee) alone, so that if he died or conveyed the land to another, the trust would not be enforced against the new tenant. Then successive extension were made. In 1465 it was laid down that a trust would be enforced against any one who took a conveyance of the land with notice of the trust, in 1483 the Chancellor said that he would enforce a trust against the trustees’s heir, and in 1522 it was said that a trust would be enforced against any one to whom the land had been given. After it had been decided that others such as the executors and creditors of the trustees would be bound by the trust, it finally became established as one of the important rules of Equity that trusts and other equitable rights would be enforced against every one except a *bona fide* purchaser of a legal estate for value without notice of these rights, or some body claiming through such a person. Equitable rights thus gradually came to look less and less like mere rights *in personam* and more and more like rights *in rem*. Although it is possible still to regard them as rights *in personam*, it is perhaps best to treat them as hybrids being neither entirely one nor entirely the other. They have never reached the status of right *in rem*, yet the class of persons against whom they will be enforced is rather large for mere rights *in personam*.”<sup>8</sup>

#### Indian Law.

• In the legal literature on the subject, one would very often come across observations to the effect that the law in India knows nothing of the distinction between legal and equitable estates or interests.<sup>9</sup> It has, for instance, been remarked that there is, in India, “but one kind of proprietary right, call it legal or equitable you choose, which is recognized by the court ; it is an entity, not divisible into parts or aspects.”<sup>10</sup> It would, however, appear that a bold statement of this nature or in these terms is misleading. For a correct comprehension of the scope of such observations, it seems essential to remember :—

- (i) that the growth and development of the Court of Chancery and of equitable principles in England are no part of the History of the law in India<sup>11</sup> and in that sense or sphere the distinction between English Law and Equity is, indeed, unknown to India ;<sup>12</sup>
- (ii) that most of the equitable principles and rules have, in India as in England, been embodied in the statute law and to the extent of the provisions made therein, it is like any other enactment, immaterial whether it had its source in common law or in equity or is an admixture of or adjustment between the two ;

8. A Manual of the Law of Real Property by R. E. Megarry. M.A., LL. B., 1946 ed., pp. 78-79.  
 9. See for instance, *Moolji Jaitha & Co. v. K. S. W. Mills' Ltd*, A. I. R. 1950 F. C. 83, 106 per Mahajan, J.  
 10. *Seedee Ali . . . v. Raja Ojoodhya*, (1867) 8 W.R. 1399, 408, per Phear, J.  
 11. *Vithal v. Shriram Savant* (1905) 29 Bom. 391, 396 per Russell, J.  
 12. *Webb v. MacPherson* (1904) L. R. 30 I. A. 238, 245.



- (iii) that such enactments do recognize and, in fact, rest on the distinction between legal and equitable estates or interests and while one can know what the law is without bothering to know whether it had its origin in common law or in equity, one cannot properly appreciate or fully comprehend them without caring to know or reach the same ;
- (iv) section 3 of the Indian Trust Act, 1882, for instance,<sup>13</sup> defines : "the beneficial interest or the interest of the beneficiary in his right against the trustee as owner of the trust property." This postulates no less than it provides for duplicate ownership or right in the trust property. The rights and interests of the beneficiary are, indeed, statutory and one need not be obliged to call it equitable in contradistinction to that of the trustee as being legal though equally statutory, but they have or continue to retain ; under the Act, almost all the incidents and limitations of the legal and equitable estates and are as good or as much of hybrids under the Indian law as have been explained to be under the English law ;
- (v) that the distinction between law and equity as is set in through or prevails after the Judicature Acts of 1873-75 in England is, in substance, and subject to statutory variations, the same in India.

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13. This aspect is clearly present in or indicated through the whole of Indian Trust Act, 1882, and the Specific Relief Act, 1877. and a good deal of the Transfer of Property Act, 1882, besides other enactments,

## THE MAXIMS OF EQUITY

### Preliminary Observations.

The doctrines and rules relating to the exercise of equitable jurisdiction are not arbitrary. They are based upon and derived from those essential truths of morality, those unchangeable principles of right and obligation which have a juridical relation with and application to the events and transactions of society. These juridical principles constituting the ultimate sources of equitable doctrines are commonly known as maxims of equity. It is, therefore, essential to examine the nature and scope of these maxims before we take up their offshoots.

The more important of these maxims are the following :—

1. Equity will not suffer a wrong to be without a remedy.
2. Equity follows the law.
3. Where equities are equal, the law shall prevail.
4. Where equities are equal, the first in time shall prevail.
5. He who seeks equity, must do equity.
6. He who comes to equity, must come with clean hands.
7. Delay defeats equity.
8. Equality is equity.
9. Equity looks to the intent, rather than to the form.
10. Equity imputes an intention to fulfil an obligation.
11. Equity looks on that as done which ought to have been done.
12. Equity acts *in personam*.

It must not, however, be supposed that the Courts of Chancery, at the very outset, began with these maxims as such, and yet it cannot be said that they were completely out of picture then. The real position appears to be that the doctrines incorporated in these maxims were in the minds of the Chancellors from the earliest times in a more or less sub-conscious and indefinite state, but gradually as the jurisdiction developed, these guiding principles became more apparent and defined and in course of time, they were couched in one or the other of these maxims and have been carried down to us in these forms.

These maxims, it need be noted, do not cover the entire field of equity jurisdiction. Moreover, they overlap, one maxim containing by implication what belongs to another. As observed by Snell, "it would not be difficult to reduce them all under the first and the last, 'Equity will not suffer a wrong to be without a remedy', and Equity acts on the person."<sup>1</sup>

These maxims, like all other maxims, are short and pithy expressions denoting principles of a very wide operation and are similarly, subject to

1. Snell's Principles of Equity, 20th ed., p. 11.

important qualifications and limitations which, in order to understand them fully and correctly, must always be kept-in view together with their general import.

Lord Esher, M. R., in *Yarmouth v. France*,<sup>2</sup> in connection with the maxim *Volenti non fit injuria* said that these maxims "are almost invariably misleading and for the most part so large and general in their language that they always include something which really is not intended to be included in them." Similarly, Justice Stephen wrote,<sup>3</sup> "They are rather minims than maxims, for they give not a particularly great, but a particularly small amount of information. As often as not the exceptions and qualifications are more important than the so-called rules—which, while they mostly serve as good indexes to the law, are mostly bad abstracts of it."

### 1. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY

Want of right and want of remedy are reciprocal and it would be vain to imagine a right without a remedy. Hence the doctrine propounded by the Chancellor was that no wrong should be allowed to go unredressed if it is capable of being remedied by the courts of justice.

In fact the very object of this maxim is to give effect to a right which is suitable for judicial enforcement but which were not enforced at common law on account of some technical defect.

Thus, in case of a trust, where A transferred some property to T in trust for B, and T did not fulfil the trust, B was helpless. The view taken by the common law was that T in law became the owner of the property and the condition if any is only an appeal to his conscience which he may lawfully ignore if he likes.

This, the Chancellor thought, was an obvious wrong. The trust cannot be dissociated from the ownership of the trust property and as such in case of a breach, the Chancellor proceeded to recognize and enforce the rights of the beneficiary.

The maxim is, in this way, responsible for the entire equitable jurisdiction of the Court of Chancery. It expresses the principle which moved the Chancellor to assume and exercise jurisdiction in those cases where there was a failure of justice due to the deficiencies in law. Thus, the Chancellor intervened in the administration of justice with a view—

- (i) to help the litigants in obtaining legal reliefs for the violation of legal rights by offering facilities in evidence and procedure which the common law courts did not secure. This, as observed earlier, was called auxiliary jurisdiction and discovery of documents or appointment of receivers may be cited, as examples of this jurisdiction. The maxim may, for the purpose of this branch of the jurisdiction, be more appropriately expressed as "Equity will not suffer a wrong to be without an effective machinery for its redress".
- (ii) to give an adequate relief where the one available in common law courts was inadequate, e. g. specific performance of contracts in place of damages—the concurrent jurisdiction ; herein the maxim

2. (1887) 19 Q. B. D. 653

3. History of Criminal Law, p. 94.

may more appropriately be expressed as "Equity will not suffer a wrong to be without an appropriate remedy," and

- (iii) to give a relief where the common law gave none, *e. g.* in case of the breach of trust—the exclusive jurisdiction. In this case the maxim aptly applies in its literal form, *i. e.* "Equity will not suffer a wrong to be without a remedy."

The generality of this maxim is, however, subject to the following limitations which would be clear from a perusal of the subsequent maxims :—

- (a) In matters falling within its exclusive jurisdiction, the function of the Court of Chancery has been to convert moral rights, *i. e.* rights recognized and enforced by conscience alone or through the force or fear of public opinion, into legal rights *i. e.* rights recognized by law and enforced by the power of the State. It has, in this connection, to be noted that Equity did not, in fact it could not, assume to itself the task of converting every moral right into a legal right. It recognized and enforced only those moral rights which though not recognized by the common law had, as to their transformation, become recognized by the public opinion and were capable of enforcement without inconvenience or danger.
- (b) The maxim does not apply where a party, whose case would otherwise come within this maxim has destroyed, lost or waived his right to an equitable remedy by his own act or laches.

It may be added that although the maxim must, for all time, continue to remain an active doctrine of Equity, its scope would continuously diminish as law develops and becomes more and more comprehensive.

## 2. EQUITY FOLLOWS THE LAW

The object of this maxim is to keep the jurisdiction of equity from overstepping the boundaries established by the prior course of adjudication. As stated earlier, the rights recognized and enforced or the reliefs granted by the Chancery were not recognized or granted by the common law. This naturally leads one to the enquiry : Did equity, in the exercise of its jurisdiction, altogether ignore law ? And the maxim furnishes an answer to the query. It expresses the *creed* of the Court of Chancery that in exercising its jurisdiction, equity did not ignore the doctrine of common law which was involved in a particular case, but followed it.

The maxim may be illustrated under two heads :—

1. *As to legal estates, rights and interests* : where equity follows the law in the sense of obeying it.

"Where a rule either of the common or the statute law is direct and governs the case with all its circumstances, or the particular point, a Court of Equity is as much bound by it as a Court of Law and can as little justify a departure from it."<sup>4</sup>

Thus, if the plaintiff invoked the concurrent jurisdiction of the Chancery for obtaining specific performance of a contract, he had to establish his right to the legal relief of damages if he were to go to the common law Courts.

4. Story's Equity Jurisprudence, 3rd ed., p. 34 ; *Salu Bai v. Bajat Khan*, (1917) 42 I. C. 200 (Nag.).

If the contract was invalid at law or the claim to damages had become time-barred, the legal relief of damages could not be available. Equity followed the law and as such did not, under the circumstances, grant the equitable relief of specific performance.

Equity, in these cases, obeyed law even if the legal rule in question were hard or unfair, as was for instance, the old rule<sup>5</sup> as to intestate succession. The rule of primogeniture in England that where a man died intestate leaving sons and daughters and possessed of a fee simple, the eldest son was entitled to the whole of the land, was undoubtedly most unfair to the younger sons and daughters but equity did not grant any relief against this rule.

2. *As to equitable estates, rights and interests* : where equity follows the law in the sense of acting in analogy with legal rules in so far as an analogy clearly subsists.

So, if B was the beneficiary under a trust, his interest in the trust property was merely equitable and not recognized by the common law, but his interest in equity was held to devolve according to the legal rule for the devolution of property.

Similarly in case of equitable claims which were analogous to legal claims, equity, as a rule, applied the time bar under the Statutes of Limitation. For example, an action brought by a beneficiary to recover trust money wrongly paid by the trustee to another beneficiary under a common mistake of fact, was held to be in the nature of a common law action for money had and received and on analogy, the statutory period of limitation of six years was applied.

It may be noted here that in India distinction between legal interests and equitable interest does not exist. In all the matters relating to legal as well as equitable interests, the statutory provisions shall apply, if there are any. In such cases equitable considerations will not be allowed to override the provisions of the statute. The Supreme Court in *Yeswant v. Walchand*,<sup>6</sup> observed : "Rules of equity have no application where there are definite statutory provisions specifying the grounds on the basis of which alone the stoppage or suspension of running of time can arise. While the Courts are necessarily astute in checkmating fraud, it should be equally borne in mind that statute of limitation are statutes of repose."

### Exceptions.

The deviations from this maxim may be stated under two heads :

(a) In cases, where an exact legal rule was neither directly applicable nor capable of being extended on principles of analogy, equity proceeded to administer justice on principles and rules of its own.

Thus, in a case ordinarily governed by the aforesaid rule of primogeniture, let it be assumed that the eldest son induced his father not to make a will by agreeing to divide the estate with his brothers and sisters. Equity certainly interfered in this case and instead of leaving the eldest son to rely on the rule of primogeniture and taking the whole property exclusively for himself, compelled him to carry out his promise. It did not mean that

5. Abrogated by the Administration of Estates Act, 1925.

6. (1950) S. C. R. 852 (868).

equity in such cases, disregarded the law altogether. Equity duly recognized the legal rule but went on to say that this does not conclude the matter. The circumstances of the son's promise must also be taken into consideration and although he cannot be dispossessed of other's share, he must hold the land as a trustee for himself and his brothers and sisters.<sup>6</sup>

Similar was the opinion with regard to the Statutes of Limitation, the rules of which, whether direct or applicable on principles of analogy, were followed by a Court of equity. But those rules were not applied where the cause of action was the fraud of the defendant or the existence of the cause of action had been concealed by his fraud.

(b) In the above class of cases, Equity did not follow the law because there was, under the circumstance, nothing in law which could properly be followed. But besides these, there were cases of *arbitrary departures* wherein, on the principle of analogy, the corresponding common law rule was applicable but not followed without any obvious reason. Such cases may be summarized as follows :

- (i) In the matter of courtesy<sup>7</sup> Equity followed the law and so where the law gave a courtesy of a legal estate, equity gave courtesy of a corresponding equitable estate. But, unlike common law, equity refused to create dower in favour of the wife out of her husband's equitable estate till the year 1833 when it became available by the Dower Act, 1833.
- (ii) A contingent remainder formerly failed at law if there was no preceding particular estate of free hold to support it, but it was never necessary than an equitable contingent remainder should vest at the moment that the preceding equitable limitation expired. After the Law of Property Act, 1925 there cannot be a legal contingent remainder, so the question of disparity does not arise.
- (iii) There was no escheat of equitable estates, the legal owner being allowed to hold the estate beneficially on the death of the beneficiary intestate and without heirs. The exception was, however, removed by the Intestates Estate Act of 1884 which provided for escheat in case of equitable estates.

In view of the subsequent legislations on these points, the exceptions now remain merely of an academic interest.

### 3. WHERE EQUITIES ARE EQUAL, THE LAW SHALL PREVAIL

This maxim together with the next—"Where equities are equal, the first in time shall prevail"—constitutes the equitable doctrine relating to questions of priority among rival claimants to the same property. In case either of these maxims does not apply because 'equities are not equal, the guiding maxim is "where equities are unequal, he who has the equity, takes precedence". Questions of priority are common enough.

6. *Stickland v. Aldridge*, (1804) 9 Ves 516, 519.

7. Under certain circumstances, the husband was entitled to an estate<sup>8</sup> for his life, in the wife's land of inheritance if he survived her. This estate was called tenancy in courtesy.

A similar estate to the wife in the husband's land in the converse case was called dower to the wife.

Suppose A, having title to land, contrives by means of fraudulent concealment to get money from X, Y and Z on the security of the land and then disappears. The land is insufficient to pay all of them. X, Y and Z are now left to dispute among themselves as to the order in which they are to be paid.

It was in resolving conflicts of such a nature, that equity applied the principles contained in these maxims. Before proceeding to consider these maxims separately, it is better to explain a superfluous contradiction which may appear at first sight. A question may be possible : When equities are equal, it is that the law prevails or the first in time, as the other maxim reads, takes precedence ? It is, in this connection, essential to note that this maxim applies in case of a conflict between a legal and an equitable estate whereas the other maxim, *i. e.*, 'where equities are equal, the first in time takes precedence' is applicable in cases where there is no legal estate in the field and the question is among the equitable estates only.

#### **The Law shall prevail.**

In discussing this maxim, it is better to confine first to the principal clause, *viz.* 'the law shall prevail'. This part of the maxim means that the legal estate prevails over the equitable estate. In other words, the person in possession of legal estate is entitled to priority over any person having merely an equitable estate in that property. This is so because of the maxim—'Equity follows the law'.

A, the owner of a house, enters into a contract with B for the sale of the house for Rs. 5,000/-. Afterwards and in breach of this contract, A actually sells and transfers the house to C for Rs. 6,000/-. B brings an action against A and C, claiming the house for himself under the contract.

In law, B did not acquire any interest in the house until the contract was completed by conveyance. In contemplation of equity, however, which looks upon that as done which ought to have been done, B acquired an interest<sup>a</sup> in the house from the moment of the contract itself. C on the other hand, through actual sale and conveyance of the property, acquired the legal estate in the house.

The Court of equity would dismiss B's claim saying : True it is that the equitable estate vests in you but C has acquired the legal estate and it is the principle of this Court to follow law and hence the legal estate must prevail over the equitable estate. The house must go to C and you are limited to a personal action against A.

This rule of priority is applicable irrespective of the consideration whether the legal estate in question is created prior or subsequent to the legal estate. The former illustration is an example of a prior equitable and subsequent legal estate. To supply the converse example, let us take a case where X creates a legal mortgage of his house to Y and then creates an equitable mortgage on the same house in favour of Z. Here, as before, Y having in him the legal estate, shall have priority over Z with merely an equitable estate.

#### **Where equities are equal.**

Let us now revert to the first half of the maxim *i. e.*, 'where equities

8. In equity, B became the owner of the house by virtue of the contract and A remained only a trustee of the house for B as was B the trustee of the purchase money for A.

are equal' which qualifies the latter 'the law shall prevail'. It means that the rule as enunciated above holds good only when equities are equal. Read together, the maxim means that the legal estate will prevail over the equitable estate only when equities are equal on both sides or stated otherwise only when the equity on the side of the legal estate is not worse. So if there is anything unfair or unconscionable or inequitable on the part of the person having the legal estate, equity will not allow him to take advantage of the legal ownership according to this maxim.

The condition 'equities being equal' has distinct meaning according as the legal estate is prior or subsequent to the equitable estate and as such it has to be considered under two heads :

(a) **Prior Equitable and Subsequent Legal Estate.**—The requisite condition in such cases has been expressed in the following terms : "*bona fide* purchaser for value without notice". Here the person in possession of the legal estate must, to satisfy that the equities are equal and thus to claim the benefit of this maxim, show that he is a *bona fide* purchaser for value without notice of the prior equitable estate or interest in the property.

T, holding a certain land in trust for S forges title deed concealing the trust and showing him (T) to be simply the owner of the land without any equitable obligation. He sells it to Y who investigates the title but the forgery is clever and deceives him. He pays the consideration and takes the conveyance. Here Y is the legal owner of the land and having acquired the legal ownership *bona fide* for value and without notice of S's equitable rights, he will have priority over S whose only remedy in this case would be against the fraudulent trustee for reimbursement.

• The rule or position is the same where X acquires the legal estate with notice of the pre-existing equitable interest attaching to the property and then transfers it to Y who had no notice of the equitable interest, Y's priority as a transferee without notice will not be defeated by notice or the inequity of X, his transferor.<sup>9</sup>

The principle of protecting a *bona fide* purchaser without notice is not peculiar to English law. It rests on grounds of public convenience which are of universal application and has been adopted in India.<sup>10</sup>

The condition may be split up and explained under three heads :—

- (i) **Bona fide purchaser**<sup>11</sup>.—In the first place, it is necessary that the acquisition of the legal estate must be *bona fide*, i. e., honest and without fraud or collusion. If it is not so, the priority is not available.
- (ii) **For Value.**—In the second place the legal owner must have paid *valuable consideration* for the acquisition of the estate. The term 'valuable' does not mean adequate ; it only means real as contrasted with pretended value. So if the consideration paid is not valuable or there is no consideration at all, the benefit of the legal estate cannot be claimed. Thus if X makes a gift of his land to Y, Y though possessing the legal estate, will not be

9. Sham Lal v. Banna, (1882) 4 All 296, 299.

10. Purnendu Nath v. Hanut Mull, A. I. R. 1940 Cal. 565.

11. The word 'purchase' is used in law not only in the popular sense of buying but also in the technical sense of a transfer.



entitled to priority because 'equity does not aid a volunteer' who always takes subject to any equity attaching to it, *i. e.*, equitable interest created in the property and in existence at the time when the legal estate was transferred to him.

- (iii) **Without Notice.**—In the third place, the person holding the legal estate must have had no notice of the subsisting equitable interest in that property. Thus in the foregoing example of a fraudulent sale of the trust property by the trustee T, if Y had notice of S's beneficial interest in the property, his claim to priority would be defeated and S can recover the land from him.

It is important to note that the legal owner must have had no notice at the time the legal estate vests in him. His earlier ignorance cannot protect nor subsequent knowledge defeat his claim. The exact point of time when the legal estate is acquired by or vests in the subsequent purchaser. In India some amount of controversy has arisen in view of the provision for registration for a complete or effective sale. Reviewing and reconciling the judicial authorities on the subject, the Calcutta High Court in *Satya Mandalini v. Sahadur Mondal*<sup>12</sup>, held that the three statutes [Specific Relief Act, Section 27 (b), Transfer of Property Act, Section 40 (2) and Trust Act, Ss. 91 and 95] contain cognate or allied provisions when read together do protect a transferee who has got the document executed and paid money in good faith without notice, and who eventually gets the said document duly registered which takes retrospectively under Section 47 of the Registration Act although he was given notice of the pre-existing contract after the presentation of document for registration but before it was actually registered.

Notice which is the most important element in this maxim, is a difficult and somewhat complicated doctrine and its fuller consideration in this place may be out of proportion to the main proposition under investigation. Section 199 of the Law of Property Act, 1925 and Section 3 of the Transfer of Property Act, 1882, incorporate the doctrine of notice under the English and the Indian law respectively, and the readers may only be referred to a suitable commentary on these Acts for an adequate information on the subject. It may, for the purposes of this maxim, suffice to note the following :—

- (i) Notice in law or in equity for the purpose of affecting the conscience may be different from and is wider than knowledge. A person is said to have notice of a fact not only when he knows it but also when he is treated in law as if he knew it. Modern practice divides notice into three categories—actual, constructive and imputed.
- (ii) A person is said to have notice of a fact when he actually knows it. This is called actual or express notice.
- (iii) A person is deemed to have notice of a fact when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. This is called constructive notice. Thus, actual notice of the existence of a deed affecting title is generally deemed to be a constructive notice of its contents. Similarly, actual notice of a tenancy affecting one's rights would be deemed to be a constructive notice of the terms of that tenancy. Constructive notice is accordingly said to be no

more than evidence of notice the presumptions of which are so violent that the court will not allow even of its being controverted.

- (iv) A person is also deemed to have notice of a fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material, provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud. This is called imputed notice.

The Common law and equitable doctrine of notice determining to a large extent the acquisition or priorities in respect of title to or interest in land were often marked to be uncertain and risky and the tendency of the Legislature is now to replace or reduce them to definite rules. It has accordingly been enacted—

- (a) that certain transfers of properties cannot be effected otherwise than through a registered instrument ; and
- (b) that where any instrument is so required to be and has been registered, any person acquiring such property or any part or interest therein shall be deemed to have notice of such instrument from the date of the registration.<sup>13</sup>

The doctrine of notice is, however, not applicable in case of subsequent transferees from the *bona fide* purchaser for value without notice.

So if A contracts to sell to B and subsequently sells to C who is a '*bona fide* purchaser for value without notice' and C again sells to D who had notice of the contract of sale in favour of B, D would still be entitled to priority over B.

Such transferees are allowed to shelter themselves under the title of the first purchaser. Because the doctrine would otherwise serve as a clog on legal ownership or as Lewin puts it : the necessary result of the doctrine "would be a stagnation of property,"<sup>14</sup> since the owner of an equitable interest could, by widely advertising his claims, make it difficult for the purchaser without notice to dispose of the property for the same price as he paid for it.

This protection is not available to those who were possessed of the legal estate earlier but the same was ineffective due to associated inequity, since the rule cannot be resorted to as a process for converting or legalising inequitable or invalid titles. So where a trustee buys back the trust property sold by him in breach of trust or X acquires property by fraud and sells it to a *bona fide* purchaser for value without notice and repurchases the same either directly or having passed through other hands, he cannot have the benefit of this rule or of his own wrong.<sup>15</sup>

#### Prior, Legal and Subsequent Equitable Estate.

- (b) Obviously, there is no question of notice to the legal owner in such cases, because the legal estate was created before the equitable

13. See for English Law, the Law of Property Act, 1925 and the Land Charges Act, 1925 and for the Indian Law, the Transfer of Property Act, 1882 and the Registration Act, 1908.

14. Lewin on Trust, 11th ed., p. 1077.

15. Borrow's case, (1880) 14 Ch. 432.

estate. We have, therefore, to consider the requirement of 'equities being equal' in such cases. In other words, we have to consider the circumstances in which the prior legal estate would be postponed to a subsequent equitable estate.

The law on the point was elaborately discussed by the Court of Appeal in the case of *The Northern Counties of England Fire Insurance Co. v. Whipp*<sup>16</sup> where it was said that the authorities justified the following conclusions :—

"That the Court will postpone the prior legal estate to a subsequent equitable estate.

"(a) Where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate *without notice of the prior legal estate*.

"(b) Where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as the first estate."

So if A mortgages his land to B and B allows A to retain the title deeds of the land with the object of allowing A to defraud others, B would be postponed to C if A by depositing the title deeds as security takes a loan from C ; C, of course, having no notice of B's interest in the property.

So far there is no difficulty or controversy. But in the case cited above, it was also laid down that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner and the following observation of the Court would serve as an illustration to the rule :—

"Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them (namely that he wanted the deeds in order that he might sell the estate and pay off the mortgage) the legal mortgagee has retained his priority over the subsequent equities."<sup>17</sup>

Maitland on the strength of this case maintains that the holder of legal estate cannot be postponed to subsequent equities 'however careless' he may have been. A study of the recent cases would, however, show that this proposition can no longer be sustained.

It was, for example, held in *Walker v. Linom*<sup>18</sup> that the negligence of the legal owner in not obtaining the title deeds was sufficient, even in the absence of any fraud on his part, to postpone him to an equitable mortgagee who had without notice subsequently advanced money on the title deeds. The underlying principle in such cases seems to be that "where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."<sup>19</sup>

The learned editor of Arhburner's 'Principles of Equity' analyses the later decisions with the following conclusion :

16. (1884) 25 Ch D 482.

17. (1884) 26 Ch D. at p. 492

18. (1907) 2 Ch. 104.

19. Per Ashhurst, J in *Commonwealth Trust Ltd. v. Akotey*, [1925] A. C. 72 followed in *Baijnath v. Firm Nand Ram Das*, A.I.R. 1926 Pat. 353.

".....That a distinction must be drawn between negligence on the part of the purchaser of the legal estate in not getting the title deeds at the time of his purchase, which is sufficient to postpone him to subsequent encumbrances without any allegation of fraud *and* negligence in the custody of title deeds once they have come into his possession, which is not sufficient to postpone him apart from fraud."<sup>20</sup>

The maxim does not, however, retain its earlier value or importance. Since the Property Acts of 1925 and particularly of Land Charges Act 1925, difficult questions of priority are less likely to arise.

In India the principle of this maxim has been incorporated in Sections 40 and 78 of the Transfer of Property Act, 1882; the former being a case of prior equitable and subsequent legal estate while the latter includes a case of prior legal and subsequent equitable estate.

The relevant portion of Section 40 runs as follows :

".....where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or an easement thereon.

"Such right or obligation may be enforced against a transferee with notice thereof or gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor, against such property in his hands."

It would be useful to reproduce the illustration as well which has been added to this section.

- "A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C who has notice of the contract. B may enforce the contract against C to the same extent as against A.

As to the form or decree in the purchaser's suit in such cases, the practice in India was on three lines :—

- (i) to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone ;
- (ii) to direct specific performance between the vendor and the plaintiff and to direct subsequent transferee to join in the conveyance so as to pass on the title which otherwise resided in him to the plaintiff ;
- (iii) to direct conveyance by the subsequent transferee alone. The Supreme Court, adopting the English practice<sup>21</sup> held<sup>22</sup> that the second of these was the proper form of the decree.

Section 78 of the Act runs as follows :—

"Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

20. Ashburner's Principles of Equity, 2nd ed., pp. 454—455.

21. Potter v Sanders, (1846) 67 E. R. 1057.

22. Durga Prasad v. Deep Chand, A.I.R. 1954 S. C. 75.

#### 4. WHERE EQUITIES ARE EQUAL, THE FIRST IN TIME SHALL PREVAIL

The maxim means : When there is no legal estate in the field, and the contest is as among the equitable estate only, the rule is that the person whose equity attached to the property first, will be entitled to priority over other or others.

Thus, if A mortgaged his property to B, then to C and then to D and the interest of all the three be merely equitable, then B's interest having been created first in point of time, he will have priority over C and D and likewise, C will have priority over D's claim.

Similarly, if A enters into a contract, for the sale of his house, with B and then with C, the interests of B and C both being equitable, B will have priority over C because his equity attached to the property first.

The rule, however, is applicable only when equities are equal. So if equities are unequal in the sense that equity on the side of the person otherwise entitled to priority is worse, i. e. he is guilty of anything unconscionable or unfair, he would lose his priority. An apt example of unequal equity is furnished by the case of *Rice v. Rice*.<sup>23</sup>

Here a vendor conveyed land to the purchaser without receiving the purchase money, but endorsed a receipt for the purchase money in full on the deed and delivered the title deeds to the purchaser. Of course, a vendor's lien at once arose for the unpaid price which was prior to any equity thereafter created on that property by the purchaser. The purchaser afterwards borrowed money and to secure its payment made an equitable mortgage of the land by a deposit of the title deeds with the creditor.

It was held that the vendor's equitable lien for the unpaid purchased money, although prior in time, must be postponed to the equitable mortgage, for it was owing to the negligence of the vendor in giving receipt when the money had not been paid, that the subsequent equity on the property was created.

It is difficult to ascertain exactly the circumstances in which an earlier encumbrancer will be deprived of his priority over the later encumbrancer.

Maitland expressed the view<sup>24</sup> that mere negligence is sufficient for the postponement of a merely equitable interest in a property. Ashburner,<sup>25</sup> on the other hand, maintains that so far as the decisions go, an equitable mortgagee has only been postponed where he has been guilty of gross negligence. Pomeroy makes the following observations on the point :

"Whether the same requirement of gross negligence applies to successive interests which are all purely equitable or whether mere negligence is sufficient to affect the priority, must be regarded as still unsettled by decisions."<sup>26</sup>

The maxim, as explained above, has no application when the subject-matter of conflicting equitable claims is a chose in action or a trust fund of personality. The guiding principle for such cases, usually called the rule in

23. (1853) 2 Drew 73.

24. Maitland's Equity, 1916 ed., p. 133.

25. Ashburner's Principles of Equity, 2nd ed, p. 455.

26. Pomeroy's Equity Jurisprudence, 5th ed., Vol. II, p. 1096.

*Dearle v. Hall*,<sup>27</sup> is that priority in such cases goes to one who was the first to give notice of his interest or charge to the debtor or trustee irrespective of the fact whether or not it is the first in point of assignment.

Equitable titles have priority according to the priority of notice. If the notices are received substantially, simultaneously, the dealings rank in the order in which they were made.

A is entitled to one-third of the sale proceeds of lands with T in trust for sale. A assigns his interest in the trust fund first to B and then to C. If C gives notice of the assignment in his favour first to the trustee, he will be entitled to priority over B, though the assignment in his (B's) favour was prior in point of creation.

It must be noted that the requirement of 'equities being equal' is equally applicable in such cases. So C cannot be entitled to priority as against B by giving notice of the assignment in his favour before that of B if he was aware of B's charge on the fund when he advanced his money to A.

The rule in *Dearle v. Hall* has been extended by section 137 (1) of the law of Property Act, 1925 to land and chattels real to which it did not previously apply. Elaborate provisions have been made in the Act with regard to the persons to be served with notice and the form of the notice. It need be mentioned that the notice in question in these cases is not the technical notice as explained earlier but here notice is a matter of fact. The test is whether the trustee received actual knowledge of the assignment or such information in regard to it as would induce a businessman to act upon it.

The rule in *Dearle v. Hall* is, however, subject to important qualification that an assignee who had actual or constructive notice of a previous assignment when he advanced his money cannot gain priority over it by being the first to give notice; for he lent his money knowing that there was a prior assignment.<sup>27a</sup>

By the aforesaid extension of the rule in *Dearle v. Hall*, the maxim has been deprived of much of its practical value because the said rule (priority being determined by the order of notice instead of the order of creation) "now governs the priorities of assignment of all equitable interests except that companies are under no obligation to accept notice of equitable interests created in shares in the company and such notice is inoperative to affect the company with notice of any trust; such interests, therefore, rank in order of date."<sup>28</sup>

Both the above maxims on priority are neatly illustrated by the case of *Cave v. Cave*.<sup>29</sup> Here the sole trustee of a marriage settlement misapplied the trust funds in the purchase of land, the conveyance being taken in the name of his brother. The brother granted a legal mortgage of the estate to X and an equitable mortgage of the same to Y. Neither X nor Y had any notice of the trust. In the question of priority among X, Y and the beneficiaries, X, having the legal estate for value without notice came first and neither of the rest two could attack him. As between Y and the beneficiaries, the interest of both being equitable, order in time, unless affected by order in point of notice, settles the order in priority and so the beneficiaries were given priority over Y.

27. (1823) 3 Russ. 1.

27a. *Stocks v. Dobson*, (1853) 4 De G. M. & G. 11 at 17 per Turner, L. J.

28. Ashburner's Principles of Equity, 2nd ed., p. 137.

29. (1880) L. R. 15 Ch. D. 639.

## 5. HE WHO SEEKS EQUITY, MUST DO EQUITY

The maxim means that any one who seeks an equitable relief, must in his turn be equitable in recognizing and submitting to the rights of his adversary because no one can have any justification in requiring another to be conscientious without himself being so.

The principle and practice of the common law Courts in giving legal reliefs may be represented in the words of Ashhurst, J. :

“In a court of law we cannot impose terms on the party suing ; if he is entitled to a verdict the law must take its course.”<sup>80</sup>

The principle and practice of the Court of Chancery in giving equitable relief was, on the other hand, entirely different, as may be shown by the following observations from Lord Cottenham :

“This Court refuses its aid to give to the plaintiff what the law would give him, if the Courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which the Court would not enforce.”<sup>81</sup>

Equitable remedies are in the discretion of the Court and so the Court would, before granting one, enquire whether the plaintiff himself need be prepared to act as a man of conscience towards the defendants. Therefore, if it appeared to the Court that the defendant is entitled in respect of the subject-matter of the suit to any equitable relief against the plaintiff, the Court would grant the equitable relief sought by the plaintiff but only upon the terms of his giving the defendant his due.

The maxim expresses the principle in an abstract form. It merely establishes the principle of imposing, where necessary, an equitable term ; as to what that term ought to be, has to be determined in each case.

There are several important applications of this maxim which may be classified under the following three heads :—

### (A)

**Adjudication of conflicting claims in one proceeding : Set off.**—See Chapter XVIII.

### (B)

**Imposition of equitable terms.**

It is the most extensive application of this maxim both under the English and the Indian Law.

1. The most common and striking instance of the application of the maxim under this head is what is called *wife's equity to a settlement*.

The wife's equity to settlement was an invention of the Court of Chancery to mitigate, where it was within its power so to do, the legal doctrine as to the rights which marriage formerly gave to a husband over his wife's property.

At common law the husband and wife were, for most purposes, treated

30. Deeks v. Strutt, (1794) 5 T. R. 690, 693.

31. Sturgis v. Champneys, (1839) 5 My. & C. R. 97, 102.

as one person and the legal existence of the wife was, during coverture, either merged into that of the husband or suspended for the time being. On marriage, therefore, the husband became at common law the absolute owner of all the wife's moneys, goods and chattels and things in action which he has reduced to possession and estates for years, and acquired a life-interest in all her free-hold estates, and was entitled to their rents and profits. The principle underlying this rule was that the husband acquired all these rights because he had to maintain her. But the law gave the wife no specific remedy to enforce her rights in such properties.

Courts of equity, in dealing with the equitable interests of the wife, gave the husband the same rights with certain exceptions as the law gave him over her corresponding legal interests, but were, unlike the common law Courts, not altogether indifferent towards the wife's interests or natural claim in such properties, and accordingly, helped the wife by recognizing in her the right known as wife's equity to settlement.

If the husband could enjoy all the rights in his wife's property without recourse to a court of justice, equity would not interfere to restrain or limit it. It was just the same if the husband, for that purpose, sought a legal relief. But if the husband had to seek the aid or relief in a court of equity in respect of his wife's equitable property, the Court interposed to secure to the wife her equity to settlement and would not, therefore, allow the husband the relief prayed for except on the terms of his making a reasonable provision for her and her children.

So, if in a trust for sale, the wife, as one of the beneficiaries, was entitled to Rs. 15,000 and the trustee refused to pay this sum of money to the husband, the only resort of the husband could be to go to a court of equity. The Court, in such cases, recognized and enforced the equitable right of the husband, *i. e.* gave him equity but subject to the condition that he did equity, *i. e.* made a suitable settlement in favour of the wife according to the rank and circumstances of the parties.

Originally, the equity to a settlement was a passive equity, *i. e.* it could be enforced only as a defendant in an action by the plaintiff. It could also be set up by an executor or trustee from whom the husband was seeking payment of the wife's property. It was then held that the executor or trustee could himself come to the Court to dispose of the fund and to protect the wife's interest in it for her benefit. Lastly, where it was clear that the subject-matter of the controversy must be adjudicated upon and distributed in a court of equity, the wife was allowed to assert her equity as plaintiff and was not obliged to wait until the husband came to the Court to seek its assistance and invite its interference.

The wife's equity to settlement is good whether the claimant was the husband himself or his assignee for value or trustee in bankruptcy. The equity is personal to the wife who may abandon it even after judgment in her favour.

The importance of this equitable doctrine has, however, been greatly lessened or, as Snell puts it, the rules as to wife's equity to settlement have become 'nearly obsolete' due to the Married Women's Property Act, 1882, which enables the wife to hold her separate properties in her right. A great change in the legal position of married women was introduced by the Law Reform (Married Women and Joint Tortfeasors) Act, 1935. The only married women to whom it does not apply, are those belonging to that fast disappearing class whose marriage took place prior to the coming into force



of the Married Women's Property Act, 1882, as regards property, other than that held for their separate use in equity, to which the title accrued before that date. Married women can now acquire, hold and dispose of any property and can sue and be sued in respect of any contract or tort in all respects as if they were single.

2. Another important application of this maxim lies in the *doctrine of election*.

Dr. Hanbury<sup>32</sup> is of the view that the doctrine of election does not fall under any of the maxims of equity. But Pomeroy has considered the doctrine to be an application of this maxim. On the doctrine of election, see Chapter XIII.

3. There are various other applications of the maxim under this head under the English and the Indian law. Some notable examples of these under the Indian law are the following :—

- (i) Section 51, for instance, of the Transfer of Property Act, 1882, under which the equitable condition is imposed upon the rightful owner causing eviction to compensate the *bona fide* occupant, under a defective title, for the improvements made on that property by him.
- (ii) Sections 64 and 65, for instance, of the Indian Contract Act, 1872 : under which the party who has received any benefit under a void or voidable contract must restore or compensate for such benefit the party from whom he received it. This does not, however, apply to or as against a minor on the ground, "that a court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person the Legislature has declared to be void."<sup>33</sup>
- (iii) Sections 30 and 33, for instance, of the Specific Relief Act, 1963, substantially re-enacting sections 38 and 41 of the Act of 1877, under which a party seeking rescission of a contract or cancellation of an instrument may be required to do equity to the other party by restoring benefit received and making such compensation as justice in the case may demand.
- (iv) Section 62, for instance, of the Indian Trust Act, 1882, imposing the equitable condition on the beneficiary to repay the trustee the purchase money with interest and other legitimate expenses where he (the beneficiary) seeks a declaration of trust or re-transfer of trust property wrongfully bought by the trustee ; similarly, section 86 imposing the equitable consideration of repaying the consideration paid in transfers of property pursuant to a rescindable contract.

(C)

**Waiver of inequitable claim, e. g., penalty or forfeiture.**<sup>34</sup>—At law, there is nothing to prevent a plaintiff from bringing an action for penalties

32. Modern Equity by H. G. Hanbury, 4th ed., p. 551.

33. Thurstan v. Nottingham Benefit Building Society, (1902) L. R. 1 Ch. 1, 13 ; Mohori Bibi v. Dharamdas L. R. 30 I. A. 114.

34. For a fuller information on this topic, see Ch. VII,

in respect of the same subject-matter which he was seeking to recover. In equity where a person seeking relief is incidentally entitled to the benefit of a penalty or forfeitures, the Court requires him, as a condition of its assistance, to waive the penalty or forfeiture, because it is unconscionable to have both.

Thus at law, where waste has been committed by cutting timber, the remainder man might sue in trover for the timber and at the same time sue for penalties. But in equity, a plaintiff could not maintain a bill for discovery or discovery and account of waste without waiving his right to an action for triple damages.

The doctrine applies only where the plaintiff has double remedy for the same thing.

There are, however, two important *limitations* bearing on the scope of this maxim :—

1. The maxim is applicable only in those cases where the adverse equity sought by or awarded to the defendant is in respect of the subject-matter of the suit or grows out of the very controversy before the Court. The maxim does not apply so as to compel the plaintiff to do equity where the relief sought by the plaintiff and the equitable right or relief secured to or sought by the defendant belong to or grow out of two entirely separate and distinct matters.

It would be useful to reproduce here a passage from Sir J. Jekyl which enunciates lucidly this principle and which has been quoted with approval by Scotland, C. J., of the Madras High Court in the case of *Clark v. Ruthnavaloo* :<sup>35</sup>

“The rule of doing equity and having equity is to be understood of particular equities and where they relate to one and the same thing ; and a special or particular equity cannot be barred by a general equity, as if to a demand of a debt the defendant should say that the other has injured him in trespass or on other accounts foreign to the thing in demand, for these would breed great confusion.”

2. The maxim applies only where a party is appealing to the Court in order to obtain some equitable relief. It is not applicable when the plaintiff seeks to enforce purely legal rights even though through a court of equity.

The fundamental difference between the legal and equitable remedies in this respect is very well illustrated by the cases of *Lodge v. National Union Investment Co. Ltd.*<sup>36</sup> and *Chapman v. Michaelson*.<sup>37</sup>

Both these cases arose under the Money Lenders Act, 1900, which makes contracts of loans void where the money-lender making the loan is not registered *as such* under the Act. In both, the plaintiff had borrowed money from the defendants who were not registered as money-lenders and the suit was for a declaration that the loan being void could not be recovered. Such declarations are legal reliefs being available under the Act or Statute law.

35. (1865) 2 Mad. H. C. R. 296, 302.

36. (1907) 1 Ch. 300.

37. (1908) 2 Ch 612

In the latter case, declaration was the only relief demanded and the Court held that it had no option but to grant it without any condition. In the former the plaintiff asked, besides declaration, for the return of certain bills of exchange which the plaintiff had deposited with him as security for the loan. This was equitable relief and the Court, therefore, refused to order the delivery up of these bills except on the condition that the plaintiff repaid the money which he had received from the defendant on the principle—'he who seeks equity, must do equity'.

#### 6. HE WHO COMES TO EQUITY, MUST COME WITH CLEAN HANDS

The maxim is sometimes expressed in the form : He that hath committed inequity shall not have equity. It means that whenever a party who seeks to set the judicial machinery in motion and to obtain some equitable remedy, has violated conscience, good faith or other equitable principle,<sup>38</sup> then the doors of the Court of equity will be shut against him and the Court will refuse to interfere on his behalf to acknowledge his right or to award him any relief.

Strahan has explained it in the following manner :

"A court of law cannot take into consideration the conduct of the plaintiff provided he is acting within the law. Even where his motive is pure malignity, if he has not broken the law, he is entitled to his legal remedy. But as equitable remedies are in the discretion of the Court, the court before granting one will enquire whether the plaintiff's conduct in the matter before it has been conscientious, and also whether he himself is prepared to act as a man of conscience towards the defendants."

The underlying principle is that a court of equity acts only when and as conscience commands and as such before the plaintiff may be allowed to invoke the jurisdiction of the Chancery against the conscience of the defendant, he must satisfy that he is clean—clear of any participation in fraud or similar inequitable conduct. If his conduct be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a Court of law, he will have no remedy in a Court of equity.

The Highwaymen's case<sup>39</sup> is an early illustration of this doctrine.

There a bill was filed by one highwayman against another for an account of the profits of robbing gentlemen on the highway. As a rule, the Court of equity will grant an account as between partners in any engagement or occupation. But therein the contract being illegal, not only was the relief refused to the plaintiff, but his solicitors were taken into custody, fined £50 and imprisoned till payment ; and the counsel who signed the bill was made to pay costs.

The maxim is applicable to a defendant as well as to a plaintiff, and a party who seeks to avail himself of an equitable defence, must stand the test as well as one who appears as plaintiff in a case.<sup>40</sup>

38. *Baban v. Bishwanath*, A. I. R. 1934 Pat. 681.

39. 9 L. Q. R. 197.

40. *Eastern Mortgage & Agency Co. Ltd. v. Rebati Kumar Roy*, 3 C. L. J. 260.

Misconduct which, under this maxim, will bar relief in a Court of equity, need not necessarily be of such a nature as to be punishable as a crime or to constitute the basis of legal action. Any wilful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean so as to deprive him of the equitable relief. The maxim is as good and active as it might have been in its inception.<sup>41</sup>

The following examples may be given to illustrate the operation of this maxim in the administration of equitable reliefs :—

### 1. Enforcement of obligations under a trust :

The maxim may here be suitably illustrated by the case of *Overton v. Banister*,<sup>42</sup> where an infant, by fraudulently concealing her age obtained from her trustees a sum of money to which she was entitled only on coming of age. Subsequently, she instituted a suit against the trustees to compel them to pay over again the money which had been improperly paid by them to her during her minority. It was held that the infant could not enforce payment over again for, although the receipt of an infant is ineffectual to discharge a debt,<sup>43</sup> yet the infant, having misrepresented her age, could not set up the invalidity of the receipt.

The principle has been incorporated in section 23 of the Indian Trust Act, 1882, which provides that the beneficiary cannot successfully sue the trustee to make good the loss to the trust property due to a breach of trust if the beneficiary has, by fraud, induced the trustee to commit a breach of trust or has concurred or acquiesced in the breach of trust which any coercion or undue influence, etc.

### 2. Specific Performance :

The equitable relief of specific performance is available in respect of any contract which is valid at law and for which legal remedy is inadequate ; but if the plaintiff's conduct in obtaining or acting under the contract is unconscientious, he will not be entitled to the same. Section 22 of the Specific Relief Act, 1877, says that "jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief *merely because it is lawful to do so*....." Similarly, section 25 of the Act denies specific performance of a contract for the sale or letting of property to the vendor or lessor if he entered into the contract knowing that he had no title to the property. And section 28 of the Act lays down that no specific performance of the contract can be enforced against the defendant if there has been any fraud or undue advantage or any other unfair practice by the plaintiff against the defendant with regard to that contract.

### 3. Injunction :

On the same principle, the court of equity declines to restrain an invasion of a copyright in works which, in the opinion of the Court, are, for instance, immoral or libellous or to restrain the infringement of a fraudulent trade mark.

### 4. The Relief of Rescission or Cancellation :

These are equitable reliefs provided for under Chapters IV and V of the

41. *Mason v. Clarke*, (1955) A. C. 778.

42. (1844) 3 Hare, 503.

43. A married infant is, however competent now under Section 21 of the Law of Property Act, 1925, to give a valid receipt for income.

Specific Relief Act, 1877, and the conditions being fulfilled, the Court would rescind a contract or cancel an instrument. But if there is anything unfair or inequitable on the part of the plaintiff, the relief will not be available to him.

A, in order to defeat the claims of his creditors, makes a fictitious transfer of his properties to B. Subsequently, when the fraudulent purpose has been served, he brings a suit for the cancellation of the fictitious transfer to B. Being guilty of fraud, A cannot be given the equitable relief that he seeks.

It may be noted that the equitable defence of unclean hands under this maxim need not essentially proceed from the defendant. If the Court is satisfied even otherwise than through the defendant that the claim is based on an illegal act (being prohibited by law or contrary to it or public policy or morality), it is bound to take notice of the illegality and refuse relief to the plaintiff.<sup>44</sup>

The maxim is subject to an important *limitation*. It does not extend to misconduct, however gross, which is unconnected with the matter in litigation and which has not in any measure affected the equitable relations subsisting between the parties.

Thus a prior trespass by the plaintiff cannot be a defence to an injunction against the defendant's similar trespass; or an injunction against the imitation and use of a label cannot be refused because the plaintiff has been selling his goods unconnected with the subject-matter of the label as those of others.

The dirt on the plaintiff's hand must, therefore, be his bad conduct in the transaction complained of or in other words, "it must have an immediate and necessary relation to the equity sued for."<sup>45</sup> If he is not guilty of inequitable conduct towards the defendant in that transaction, his hands are as clear as the Court may require.

In *Surasaibalini v. Phanindra Mohan*,<sup>46</sup> X established and carried on a boarding house business in the name of Y in order to escape the rule of the court of wards of which he was an employee prohibiting any trade or business basis, by its servants. Income-tax return was filed and the assessment made on the same *i. e.*, exclusive of X's salary, etc.

X became seriously ill and had to go out for sometime. He accordingly entrusted the business so Y on the understanding to take back the same on his return. Y refused to handover the business to X and hence the suit for delivery of possession of business. It was established from the evidence on record that X was the real owner of the business. The defence of Y was that in view of his conduct X was not entitled to the assistance of or grant of any relief by the court. It was held that the service rule in question was not shown to have statutory force and could not as such be said to taint the arrangement with illegality or immorality. Although the arrangement resulted in the evasion of income-tax in respect of his personal income and lower rate on business income but it was neither the object of the arrangement nor related to the act complained of or the relief sought. It could not, therefore, be said that *benami*-transaction between the parties was with a view to circumvent

44. *Gedge v. Royal Exchange Assurance Corporation*, (1900) 2 Q. B. 214, 220.

45. *Derring v. Earl of Winchelsea*, (1787) 1 Cox. 318, 319-20.

46. A. I. R. 1965 S. C. 1164.

or defeat the provisions of the Income-tax Act. The doctrine of *pari delicto* could not, therefore, be invoked to defeat the relief sought and the suit on such must be decreed.

There have been from the earliest times certain *exceptions* to this maxim wherein the requirement of clean hands has not been insisted upon :

- (i) *Cases of Public Policy*.—Where a transaction is against public policy, the fact that the plaintiff has not a clean record in the matter, is no bar to his being relieved from the obligations under such a transaction.

Thus, in *Drury v. Hooke*,<sup>45</sup> a man of sixty with seven children gave a bond to another to procure his marriage with a lady of large fortune. The marriage took place, but the executant was relieved from the bond.

Lord Eldon says :

It is settled that if a transaction be objectionable on grounds of public policy, the parties to it may be relieved ; the relief not being given for their sake, but for the sake of the public.”<sup>46</sup>

- (ii) *Repentance before anything done to carry out the illegal purpose*.

A makes a fictitious transfer of his properties to B with a view to defraud his creditors, but ultimately decides to pay them and the fraudulent purpose is not carried out. A can maintain a suit for the cancellation of the transfer deed.

It is essential that the relief must be sought before anything is done to carry out the illegal purpose. If the illegal purpose has been carried out wholly or partially, no relief would be available. The distinction in this respect may be illustrated by means of the following cases :

- (x) *Brich v. Blagrove*<sup>47</sup> : In this case Petty conveyed several estates to his daughter in fee, in order to disqualify himself from being the sheriff of London. He kept the conveyance secret and remained in possession of the estates.

But afterwards instead of relying upon the feigned disqualification, he paid the usual fine for not accepting the office. Held, that the conveyance ought not to take effect unless he actually took the oath that he was not worth £15,000, thereby executing the illegal purpose for which the conveyance was made.

- (y) *Pitt v. Pitt*.<sup>48</sup> Here Governor Pitt granted his younger son, the plaintiff, an annuity in order to qualify him for membership of Parliament and afterwards got the deed and burnt it. The son ultimately became a member of the House of Commons by virtue of that conveyance.

It was held that the purpose of the conveyance, though aimed to be fictitious, having been carried into effect, it could not be subsequently avoided.

This maxim seems at first sight to be but a different way of expressing the preceding maxim, but there is a vital distinction between the two.

- (a) Though both these maxims purport to regulate the grant of equitable relief, the latter applies as a condition precedent to the relief while the former amounts to a condition subsequent to the relief. The latter maxim refers to the conduct of the plaintiff before

45. (1686) 2 Ch. Cas. 176.

46. (1821) Jac. 67.

47. (1755) 1 Amb. 264.

48. Cited by Willes, A. G., *arguendo cast*, to Table 155.

he comes into the Court, which if inequitable, would disentitle the plaintiff to the relief. The former refers to the conduct of the plaintiff as the Court thinks it ought to be after he comes to the Court and the plaintiff has to satisfy it as the price or condition of enforcing his equity.

- (b) Accordingly, the plaintiff has, in the former, an option either to submit to the equitable condition and then, and then alone, to receive the equitable relief or to withdraw from the Court altogether. Under the latter maxim, the plaintiff has no option. He, being guilty of a conduct in violation of the fundamental conception of equity, is disabled from any recognition or enforcement of his right.

## 7. DELAY DEFEATS EQUITY

In *Brigh v. Legerton*,<sup>49</sup> Lord Campbell says :—"It has been beautifully remarked, with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed."

The passage reveals briefly the principle and rule that the prosecution of a claim in a Court of justice cannot be left entirely to the convenience and sweet will of the person entitled to it and it is desirable that a time limit should be imposed within which proceedings to enforce a claim must be started. In every legal system, therefore, rights or reliefs are, by Statute, limited in time after the expiration of which the right itself or the remedy becomes barred.

The Statutes of Limitation in England originally applied only to Courts of Common law and the remedies given by the Court of Chancery, being outside the law were not, generally and strictly speaking, within the purview of those Statutes and as such not barred by limitation. But the court of equity, acting on the basis of this maxim considered it contrary to conscience for plaintiffs to take advantage of this and harass the opposite parties by undue delay in applying for its remedies.

The maxim, which is also expressed as "Equity aids the vigilant and not the indolent (or dormant)" is very well explained through the following words of Lord Camden in *Smith v. Clay* :<sup>50</sup>

"A Court of equity has always refused its aid to stale demands where a party has slept upon its right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence ; when these are wanting the Court is passive and does nothing."

Acting on this doctrine the Court of Chancery adopted the Statutes of Limitation as far as it could. Dr. Hanbury resolves the attitude of equity towards these Statutes into the following three simple propositions<sup>51</sup> :—

- "(i) In the case of purely equitable claims, equity will grant or refuse equitable relief at its discretion without reference to any Statute of Limitation, unless the Legislature has expressly included an equitable claim in such a Statute.

49. (1861) 2 De G. F. & J. 606 607.

50. (1767) 3 Bro. C. C. 640 n.

51. Modern Equity by H. G. Hanbury, 4th ed., pp. 50-51.

“(ii) In the case of legal claims, or equitable claims which are closely analogous to legal claims, equity will, as a rule, apply the period prescribed by the Statutes of Limitation.

“(iii) But if there has been fraud on the part of the defendant, and the plaintiff did not discover the fraud, though no fault of his own, till after the statutory period has elapsed, then equity will consider that the period has not begun to run until the date of the discovery of fraud.<sup>52</sup>”

It was through legislation in the nineteenth century that the greater number of equitable claims were explicitly covered by the Statutes of Limitation. There are still, however, cases in equity to which no statutory bar applies and in which, the Court would resort to its inherent doctrine expressed through this maxim.

Lapse of time will afford a defence to a legal claim only when the remedy has been barred by a Statute of Limitation.<sup>53</sup> Equitable claims, on the other hand, may be barred, not only by Statutes of Limitation but also by unreasonable delay of the plaintiff in seeking equitable relief. Such unreasonable delay is technically called “laches”.

The doctrine of laches which applies only to equitable and not to legal claims is, as stated by Dr. Hanbury,<sup>54</sup> a defence advanced by a defendant against a plaintiff who, though not barred by statute, nevertheless ought not to succeed by reason of his apathy. Laches in legal significance is, however, not a mere delay but delay that works a disadvantage to another.

Thus for example, where a purchaser seeks to set aside or rescind a contract, he must apply for relief with reasonable diligence, and where owing to delay on his part other parties have acquired rights or the property has deteriorated in value or changed in condition the Court will refuse rescission.

The genesis of this doctrine may be stated through the following passage from the judgment of Bowen, L. J., in *Blake v. Gale*:<sup>55</sup>

“When we find that a long time has elapsed during which the right has never been insisted upon, and when neither the Statute of Limitation applies, nor can the analogy of the statute be invoked according to the well-known way in which Courts of Equity occasionally invoked it, what have we to do? We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn the claim will.....be treated as abandoned.”

Strahan observes: “The doctrine of laches in Court of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or when by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other

52. For illustrations of these cases see the maxim “Equity follows the law” on pp. 39-41 *supra*.

53. *Knox v. Gye*, (1872) L. R. 5 H. L. 656.

54. *Modern Equity* by H. G. Hanbury, 4th ed., p. 51.

55. (1886) 32 Ch. D. 571, 581.



party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases lapse of time and delay are most material.

What constitutes reasonable diligence can be established by no reasonable rule, since the question must be determined upon the circumstances of each case. What may be inexcusable delay in one case will not be inconsistent with diligence in another. The weight which is to be attached to lapse of time, whether standing by itself or coupled with a change of position on the defendant's part, varies according to (i) the nature of the claim, *e. g.*, more promptness and haste must be shown for an interlocutory or mandatory injunction as compared to that for a permanent injunction. Similarly, more promptitude is required for specific performance where plaintiff is not in possession than where he is in possession, (ii) the character of the claimant, *e. g.*, laches is not imputed to a class so readily as to an individual. And a corporation cannot be expected to act so readily as an individual, (iii) the subject-matter with which the claim deals, *e. g.*, quicker step would be required if the property be of a fluctuating, wasting or speculative nature where short delay would be fatal but not so if otherwise.<sup>56</sup>

As there can be no abandonment of a right without full knowledge, legal capacity and free will, ignorance or disability or undue influence will be a satisfactory explanation of delay.

Laches and acquiescence are distinguished by Mr. J. W. Brunyate<sup>57</sup> on the footing that the latter must include the former. When a defendant pleads laches on the part of the plaintiff, he asserts simply that the plaintiff has allowed time to elapse, but where he charges him with acquiescence, he charges him also with actively waiving his rights.

## 8. EQUALITY IS EQUITY

The maxim is also sometimes expressed as 'Equity delights in equality'. The notion of equality or impartiality lay at the very foundation of the *aequitas* as conceived by the Roman jurists and the same idea was, from the outset, incorporated into the equity jurisprudence evolved through the Court of Chancery in England. While the common law looked at and protected the rights of a person as a separate and distinct individual, equity rather regards and maintains, as far as possible, the rights of all who are connected by any common bond of interest and obligation. In such cases, equity acting on this maxim, apportions the benefit and burden of common interests and obligations equally among them instead of allowing it to go or fall upon one or some of them only.

The maxim is of a very wide and general application. It may be illustrated by means of the following examples of this doctrine :

1. Contribution ;
2. Equity's dislike for a joint tenancy ;
3. Abetment of general legacies where there is a deficiency of assets ;
4. Execution by the Court of a non-executed power in the nature of a trust ;
5. Marshalling ;
6. Distribution of joint fund or property.

56. *Nawab Begum v. A. H. Creet*, (1905) 2 A. L. J. 405, relying on *Milward v. Earl Thanet*, (1801) 5 Ves 720n.

57. Mr. J. W. Brunyate—*Limitation of Action in Equity*, (1932) pp, 188-89,

### 1. Contribution :

This is the most important doctrine which results from this maxim.

The Rhodian law, in case of jettison, declared that, "If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all". From the Rhodian jurisprudence the principle was borrowed by the Roman Law wheréfrom it came to the English law.<sup>58</sup>

The principle is not confined to jettison or maritime operations but has been applied to a variety of cases, the commonest of which may be said to be that of co-sureties.

A, B and C bind themselves as sureties for a debt of Rs. 3,000/- advanced by X to Y. On Y's failure to pay off the debt, X has a right to recover the whole amount from any of the three and if A has been compelled to pay the whole and cannot obtain indemnity from Y he (A) is entitled to a contribution of one-third from B and the other one-third from C and has to bear only the remaining one-third for himself.

The theory of contribution is not the result of contract but is based upon the principle of natural justice. Since all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all. Any other rule would put it in the power of the creditor to select his own victim; and upon motives of mere caprice or favouritism, to make a common burden a most gross personal oppression. It would be against equity for the creditor to exact or receive payment from one and to permit or by his conduct cause, the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound.

Although contribution has, of long, been a familiar rule of law, "it should not be forgotten that its inception and origin are wholly due to the creative functions of the Chancellor. The law will not interfere with the action of the creditor; it will not compel him in any manner to obtain satisfaction from all the debtors *pari passu*; and after one of the number had..... been obliged to pay the whole amount, the ancient common law, prior to its adoption of doctrines borrowed from equity, failed to give him any right of recourse upon his co-debtors by means of which the burden might finally be distributed among them all in just proportions. The rules of the modern law giving such right of reimbursement are a direct importation from the equity jurisprudence."<sup>59</sup> There remained, however, a difference between law and equity with regard to the rules on contribution which may be stated under the following two heads:—

- (i) At common law the aliquot share of liability of a co-surety was fixed by the number of sureties originally bound and remained unaffected if one of them became insolvent and had nothing to pay. Equity, on the other hand, ascertained the proportionate liability of the co-sureties in reference only to the solvent sureties.

So if A, B and C are co-sureties for Rs. 1,200 and A has been compelled to pay the whole amount, he can recover from B and C Rs. 400 each. So far there was no difference between common law and equity. But what

58. Story's Equity Jurisprudence, 3rd ed., p. 202.

59. Pomeroy's Equity Jurisprudence, 5th ed., Vol. II, para. 158, at pp. 145, 146,

would be the position if B becomes insolvent and nothing can be recovered from him? The view taken by the Common law was that each co-surety agreed to contribute one-third of the loss and no more and so, in spite of B's insolvency, C could not be compelled to contribute more than one-third, *i. e.* Rs. 400.<sup>60</sup> Equity took a different, and as Maitland says 'a more sensible' view that the whole loss must be borne equally. The rule in equity, therefore, was that those who can pay must not only contribute their own shares but they must also make good the shares of those who are unable to furnish their own contribution. So in case of B's insolvency, C, in equity, had to pay half, *i. e.* Rs. 600.

The Judicature Act, in case of conflict established the supremacy of equity and hence the equitable rule prevails.

- (ii) No action for contribution could be brought at common law until the surety had actually paid more than his proportion of the debt; but it has always been possible in equity for a surety to bring an action, in the nature of *quia timet*, against the co-sureties, even before payment, if judgment has been obtained against him by the creditor for more than his proportion, or perhaps if he is merely threatened by the creditor with an action for more than his proportion.<sup>61</sup>

It is very important to note that though the right to contribution is not based on contract, yet it may be modified by contract; thus in *Craythorne v. Swinburne*,<sup>62</sup> A and B were co-sureties, but the arrangement between them was that B should be liable only in the event of A's default, and so A could not, after making payment, call upon B for contribution.

The doctrine of contribution, it need be noted, applies not only among co-sureties but also among joint-debtors, co-contractors, and all others upon whom the same pecuniary obligation, arising from contract, express or implied, rests.

The statutory applications of this doctrine under the Indian law are :—

- (i) Section 43 of the Indian Contract Act, 1873 which entitles a co-promisor who has performed the promise to compel other joint-promisors to contribute equally;
- (ii) Section 146 of the Indian Contract Act, 1872 which provides for contribution among co-sureties;
- (iii) Section 27 of the Indian Trust Act, 1882 which provides for contribution among co-trustees in case of a breach of trust;
- (iv) Section 82 of the Transfer of Property Act, 1882 which provides for contribution to the mortgage debt by the co-mortgagors.

## 2. Equity's dislike for a Joint Tenancy :

Joint tenancy and tenancy-in-common are the two of the four types of co-ownership under English law.

A joint tenancy comes into being when land is conveyed to two or more persons without any words to show that they are to take distinct and separate shares, or, to use the technical expression, when the conveyance is without words of severance, *e. g.* where estate is conveyed to A and B in fee simple. If, on the other hand, the grant contains words of severance showing an intention that A and B are to take separate and distinct shares, as for instance,

60. *Lowe v. Dixon*, (1886) 16 Q. B. D. 455.

61. See *Snell's Principles of Equity*, 20th ed., p. 479.

62. (1807) 14 Ves. 160.

where there is a grant to A and B equally or "in equal moities" or "to be divided between them," the result is the creation not of a joint tenancy but a tenancy-in-common between A and B.

Stating and following the English law as to the accrual of joint tenancy, it was held by the High Court of Allahabad that "*a fortiori* it appears to us that in India where joint family is so well recognized, a gift to two brothers, members of a joint family, without indicating that they were to take as tenants-in-common, constitutes a joint tenancy."<sup>63</sup> The preponderance of authorities is, however, overwhelmingly to the contrary. It has been held by the Privy Council that there is no justification ".....in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law, except in case of a coparcenary between the members of an undivided family."<sup>64</sup> The rule is, of course, applicable only in the absence of a contrary intention appearing from the grant itself.<sup>65</sup>

The principal incidents of a joint tenancy are :—

- (i) The absolute unity, *i. e.* unity of possession, interest, title and time which exist between joint tenants. Every joint tenant is seised or possessed of the joint property by every part and by the whole so that they have a single title to pass to the purchaser.
- (ii) The most important quality of a tenancy is that of survivorship so that if A and B are joint tenancy and A dies the whole property would go to B and A's issues will have nothing.

The corresponding incidents of a tenancy-in-common are :

- (1) Here only the unity of possession is essential. The tenants-in-common have an undivided possession but of several and distinct interests in the property. No one is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with others.
- (2) The rule of survivorship does not apply and on the death of one of them, his share passes not to the surviving tenant or tenants but to his heir or devisee who then becomes tenants-in-common with the survivors. Thus, if A and B hold land as tenants-in-common and A dies, his interest or share would go not to B but A's heirs who would, after A's death, become tenants-in-common with B.

The difference between the principal incidents of a joint tenancy and tenancy-in common led to divergence of view between the common law and equity.

Common law showed a preference for joint tenancy because—

- (a) the operation of the doctrine of survivorship made it more likely that the land would ultimately vest in a single tenant and thus facilitate the performance of feudal services,<sup>66</sup> which were incidental to the tenure of land ;
- (b) the tenancy-in-common but not a joint tenancy rendered feudal services separately from each tenant, thus increasing the burden on the land ;

63. Mankamma Kunwar v. Balkrishna Dass, 1905 A. W. N. 170, 171.

64. Jogeswar Narain v. Ram Chandra Dutt, (1896) L. R. 23 I. A. 37. The same rule is applicable even to such a gift or bequest to members of a coparcenary.

65. Buchi Bai v. Nagpur University, I. L. R. 1946 Nag. 433.

66. e. g. pay rent, serve in wars, to plough the lord's land or make his hedges, etc.

- (c) from the point of view of conveyancers he had to investigate title, a joint tenancy was preferable to a tenancy-in-common because joint tenants held by a single title whereas the title of every tenant in tenancy-in-common had to be separately examined.

Equity was not overcareful to the rights of the lord and despite the advantage of a joint tenancy from the point of view of investigating title, it showed, in the interest of justice, marked inclination in favour of a tenancy-in-common. Equity is equity and equality is not very obvious if the longest liver becomes the absolute owner of the land. Joint tenants are, indeed, equal so far as the present is concerned but the extent of future equality is simply an equality of chance or risk. Equity looked to the beneficial interest of the co-tenants and preferred the certainty and equality of a tenancy-in-common to the element of chance which the *jus accrescendi* of a joint tenancy introduced.

The preference for a tenancy-in-common was manifested by equity in holding that a tenancy-in-common would exist in equity not only in those cases where it existed at law, but also in certain other cases where an intention to create tenancy-in-common could be discerned or inferred. Equity held it to be so in the following three cases :

- (i) *Joint loan on a mortgage* : Where two or more persons advance money, either in *equal or unequal* shares, and take a mortgage of land to themselves jointly, the rule *at law* was that they are joint tenants, but the rule in equity, which prevails over that at law, is that they are tenants-in-common and, therefore, the survivors would become not sole owners but only a trustee for the personal representatives of the deceased mortgagee to the extent of his share in the loan.

The consideration which led equity to take this line is that the mere fact of the transaction being a loan is sufficient to repel the presumption of an intention to hold the mortgage as a joint tenancy. It means that each sought to lend his own and to take back his own.

Similar considerations and incidents prevailed in the other two cases.

- (ii) *Joint Purchasers of Land in case they advance money in Unequal Shares* : The co-purchasers in such cases were, in equity, treated as tenants-in-common. If, however, the purchase money had been advanced in equal shares, it would be a joint tenancy both at law and in equity, the presumption, in equity, being that in advancing money in equal shares they intended to benefit by the rule of survivorship.<sup>67</sup>
- (iii) *Land bought by Partners* : Where partners acquired land as part of their partnership assets, they were presumed to hold as tenants-in-common. The rule extended to any joint undertaking with a view to profit.

'Equity's preference for tenancy-in-common' had its application even in those transactions which led to joint tenancy both at law and in equity. Equity, in those cases, treated, on the slightest pretext, the joint-tenancy to have become severed so as to avoid the incident of survivorship. So if A, B and C purchased land for Rs. 15,000 each advancing Rs. 5,000 they held as joint tenants both at law and in equity. But an agreement by A to alienate for valuable consideration his share in the property, would cause a severance in equity of the joint tenancy as regards A's share.<sup>68</sup>

67. *Lake v. Gibson*, (1729) 1 Eq. Ca. Abr. 294.

68. *Brown v. Raindle*, (1796) 3 Ves. 256.

There are four modes of severance of a joint tenancy in this way—(a) alienation by one joint tenant ; (b) acquisition by one tenant of a greater interest than those held by the co-tenants ; (c) partition and (d) sale.

Substantial changes in the law have been made by the law of Property Act, 1925. After 1925 the only form of co-ownership possible at law is a joint tenancy. No legal estate in land can now be held on a tenancy-in-common even if there are clear words of severance. Thus a conveyance today "to A, B and C in fee simple as tenants-in-common" (all being of full age) will vest the legal estate in A, and B and C as joint tenants. But a tenancy-in-common can still exist in equity.

So the maxim is still important in this connection, for the doctrine of survivorship continues to apply to joint tenancy but not to tenancy-in-common.

### 3. Abatement of General Legacies :

It may be noted that "an action for a legacy could not be brought at common law,<sup>69</sup> but the Court of Chancery had a concurrent jurisdiction with Ecclesiastical Courts in suits for legacies. The jurisdiction, however, of the ecclesiastical Courts became obsolete by the end of the 18th century",<sup>70</sup> whereafter the remedy lay exclusively in the Court of Chancery.

All the legatees take *pari passu* ; and if the assets are not sufficient to pay all the legatees in full, the legacies are all required to abate proportionately unless some priority is specially given by the testator to particular legatees. A *pro rata* deduction is consequently made from all those legacies. The principle is that *prima facie* the testator must be presumed to have considered that he had assets sufficient to answer all the legacies. But in case it does not come to be so as a matter of fact the testator could only be presumed to have meant that the deficiency should be borne by all the legatees equally. If a legatee whose legacy was liable to abate has been paid in full, he must return, for the benefit of the other legatees, the excess received by him. It need be emphasized that the rule as to abatement is confined to the legatees belonging to the same class.

In India the rule for the abatement of legacies is contained in Section 330 of the Indian Succession Act.

### 4. Execution by the Court of a non-executed power in the nature of a trust :<sup>71</sup>

If the donee of a power in the nature of a trust fails to exercise the power a Court of Equity will not suffer the power to fail wholly, but will carry it into effect in accordance with the principle of equality under this maxim.

Where a power, in the nature of a trust over certain properties is given to X to appoint "among the children of A", X can give the properties to any, some or all of them in any share or proportion that he liked or preferred. But if X makes no appointment, the Court of Equity will not allow A's children to be deprived of the benefit but will distribute the properties in question among all the children of A equally.

### 5. Marshalling of Assets :

The principle of 'equality is equity', was carried out in the administra-

69. Except in case of specific legacy to which the executor had assented where it became the personal liability of the executor on the basis of an implied promise.

70. Ashburner's Principles of Equity, 2nd ed., pp 410, 411.

71. See Ch XX, infra.

tion of assets also and with a view to enable all the creditors to recover their debts as far as possible without prejudice to any, the doctrine of marshalling of assets was established.

Where there are two creditors of the same debtor and one creditor has right to resort to two funds of the debtor for payment of his debt, and the other creditor has a right to resort only to one fund, the court will so "marshall" or arrange the funds that both creditors are paid as far as possible.

The owner of two estates X and Y mortgages them both to one person A and then mortgages Y alone to B. The Court will order A to be paid out of X as far as possible so as to leave as much as possible of Y for the payment of B. If A has already paid himself out of B, the Court will allow B to have recourse to X to the extent to which Y has been exhausted by A, though originally he had no claim against it.

The principle is also applied in the distribution of assets of a deceased person as between persons beneficially entitled to the deceased's estate.

#### 6. Distribution of joint fund or property :

Where there is a common pool or joint fund or property and there is nothing to indicate on what basis it was initiated or continued, there will be an equal distribution of such fund or property among the contributories. In applying this principle in dividing between the husband and wife after their divorce a bank balance which was pooled and drawn upon by both, Vaisey, J., said, ".....the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid by the husband or the wife, is quite inconsistent with the original fundamental idea of a joint purse or a common pool.....Where one is searching for justice as one must, and cannot find any other source on sound basis, I think that equality is the best rule."<sup>72</sup> The same principle was applied by the Court of Appeal in *Rimmer v. Rimmer*,<sup>73</sup> while dividing the proceeds of a sale of a house purchased by the advances made both by the husband and wife. Denning, L. J., stated the rule thus : "In cases when it is clear that the beneficial interest in the matrimonial home, or in the furniture, belongs to one or the other absolutely, or it is that they intended to hold it in definite shares, the court will give effect to their intention<sup>74</sup>.....But when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity." The rule is obviously general and, though common, is not confined to spouses or members of a family. Romer, L. J., however, went further in laying down an important qualification or proviso to this rule. His Lordship observed : ".....but I want to make it quite plain that if the respective contributions had been substantially different then it may be that the best course was to adopt the proportionate basis."<sup>75</sup>

The equity of this proviso in case of husband and wife or members of the same family as distinguished from other cases seems, it is submitted with respect, to be doubtful since the living, labour or earnings of the individuals is so mixed and interdependent that it may not be just to distribute the fund or property according to the nominal value or the actual figures of the contribution as such.

72. *Jones v. Maynard*, (1951) 1 Ch. 572, 575.

73. (1953) 1 Q. B. 63.

74. *Ibid* p. 73, Evershed, M. R. concurring.

75. *Ibid* p. 76.

It need be borne in mind that the term 'equality' in this maxim means "proportionate" and not 'literal' equality. To illustrate it in reference to the abatement of legacies let us take a deceased's estate after payment of debts, etc. to be Rs. 6,300 only and under the will A is to take Rs. 4,000, B Rs. 2,000 and C Rs. 1,000. All cannot, therefore, be paid in full and so all the legacies would abate equally. But this does not mean that the deficiency of Rs. 700 will be spread over A, B and C equally by Rs. 234/5/4 each, but the legacies in favour of A, B and C will abate by Rs. 400, Rs. 200 and Rs. 100, respectively.

## 9. EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM

This maxim incorporates the equitable rule on construction of instruments. It explains the attitude of equity in dealing with the construction of contracts and other transactions. The ancient Common law paid great deference to matters of pure form with regard to the acquisition or transfer of property. Another characteristic feature of the common law was that it held contracting parties to a most rigid observance of all the stipulations of their valid agreements; performance to the very letter of every covenant or promise was the inflexible rule.

The principle adopted and followed by the Courts of equity in these respects, differs widely from that of the common law. "The Courts of Equity have always made a distinction between that which is a matter of substance than that which is a matter of form"<sup>76</sup> and have accordingly endeavoured to get at the substance of things. It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction. It, therefore, seeks for the real intent under the cover of whatever forms and appearances and gives effect to such intent in ascertaining the rights and obligations of the parties unless prevented by some positive and mandatory rule of law.

The maxim also emphasises the principle that the court does not require unnecessary formalities to be gone through. It will avoid circuity of action by holding valid a transaction, which, although unauthorised, could lawfully have been effected by going through two or more separate transactions.<sup>76a</sup>

The most common applications of this maxim lie in (1) Relief against penalties and forfeitures; (2) Precatory trusts; (3) Attitude of equity towards mortgagees; and (4) Attitude of equity towards the Statute of Frauds.

### 1. Reliefs against penalties and forfeitures :

See Chapter VII.

### 2. Precatory trusts :

Another example of the application of this maxim is to be found in what are known as precatory trusts.

A transfers certain properties to T and expresses a wish, hope or desire that T will use it in a certain way or for a certain purpose. Looking at the words to the form of conveyance alone, it appears to be an absolute transfer of property together with a desire but at the same time the liberty to T to ignore it if he pleased. But a court of equity looks to the intent instead of confining itself to the form and, therefore, notwithstanding the use of recommendatory words, the Court seeks to discover the true intention or the transfer and if after looking at the whole instrument and taking other circumstances into consideration it appeared that the donor meant to impose an obligation on his donee to

76. Shanmugam Pillai v. Annalaksmi, A. I. R. 1950 F. C. 38, 58.

76a. Re Collard's, W. T. 1961 Ch 293.



carry out his wishes, it would be a case of trust and T would be obliged to hold the properties as a trustee for the objects specified by A.

### 3. Attitude of equity towards mortgages :

Another remarkable application of this maxim lies in the equity of redemption—the equitable right and estate of the mortgagor in the mortgaged property after the legal title of the mortgagee had become absolute by a non-performance of the condition.

A takes a loan of Rs. 10,000 on an interest of 4 per cent per annum from B and mortgages his house to B and both agree that in case B pays back A Rs. 10,000 together with the interest due on a certain day, the house would become free from the mortgage. Let us assume that the day fixed expires without the payment of the loan and interest.

Under the old common law B became the legal owner of the house subject to the condition that if A repaid the loan on the day fixed, he gets back the house but if the condition was not performed B's interest in the house became absolute.

Equity, on the other hand, looked at the real intent of the parties and regarded the debt as the substantial feature and the conveyance of the house through the mortgage as a mere security for the debt. As Lord Nottingham put in *Thornborough v. Baker*,<sup>77</sup> "in natural justice and equity the principal right of the mortgagee is to the money and his right to the land is only as a security for the money". The Court of Chancery, therefore, declared it to be against conscience that the mortgagee should retain as owner for his own benefit what was intended as a mere security. So A, although he lost his legal right to redeem, retained 'an equity to redeem' on payment, within a reasonable time, of the principal, interest and costs.

The equitable doctrine in relation to mortgages is clearly explained through the following expressions of Lord Nottingham, L. C. : "This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases, and therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance become absolute and there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."<sup>78</sup>

Thus the Court of Chancery did not, in case of mortgages, recognize any device to defeat or impede the equity of redemption and inventing and consistently applying the maxim 'once a mortgage always a mortgage' held that whenever a conveyance of property is intended to be a security for debt, no agreement or stipulation restricting the mortgagor's equity to redeem is valid. Courts of equity in determining whether a right of redemption exists, consider not the outward form which the transaction assumes but its real and inward substance.

So strongly does Equity cling to the mortgagor's right to redeem that oral evidence can always be adduced by a mortgagor to show that a document which is, on the face of it, an absolute conveyance was, in reality, a mere mortgage and *a fortiori*, the mere omission of the usual proviso for redemption in no way restricts the mortgagor's right to redeem. If the Court comes to the conclusion that in reality a conveyance was intended merely as a pledge for the

77. (1675) 3 Swans 628.

78. *Ver or v Bethell*, (1762) 2 Eden 110, 113,

repayment of money, then whatever the form and whatever the stipulations it may contain to the contrary, the right of the mortgagor to redeem shall be upheld.

The right of redemption can be exercised any time after the day fixed for redemption at law. It can only be put an end to (i) by the order of the court foreclosing the mortgagor, or (ii) by the operation of a statute of limitation.

#### 4. The Attitude of equity towards the Statute of Frauds :

With a view to prevent fraud and perjury the Statute of Frauds, repealed and replaced by the Law of Property Act, 1925, insisted upon writing and signature of the party sought to be bound for any enforceable agreement in respect of land.

Equity, working on this maxim, evolved two exceptions to the Statute of Frauds on the principle that equity will not permit the Statute of Frauds to be made an engine of fraud or to cover fraud :

- (i) If the agreement was intended to be put into writing but was not put into writing owing to the fraud of the defendant he would not be allowed to set up the Statute as a bar to the action. The basis of this exception was that the intention of the legislature in enacting the Statute of Frauds was to prevent fraud and so a case of fraud which technically fell within this Statute should not be allowed to be perpetrated on account of the Statute.
- (ii) Whenever a contract of which the court was accustomed to grant specific performance fell within the Statute of Frauds, part-performance of the contract by the plaintiff would take it out of the Statute. This exception is based also or more on the subsequent maxim, *i. e.* "Equity regards that as done which ought to have been done". The rule is based on the reasoning that though the contract falls within the Statute and cannot, on that account, be enforced at law, yet since the intentions of the parties are not only genuine but have been substantiated by concrete bilateral acts of the parties in furtherance of the contract, it should be placed beyond the purview of the Act; the principle being that equity will not allow the law to be made a shield for fraud. As a rule, most acts of part-performance are the acts of both parties, as for example, the delivery and acceptance of possession of the land agreed to be dealt with. But where the part performance is by one party only he alone can claim specific performance on the strength of it.

The maxim in this sphere may be expressed as "Equity looks to the spirit and not the letter of the law". But it must, in this sense, be considered to be obsolete and cannot any more be imported into the interpretation of Statutes. It must be confined to provisions in contracts.

The equitable doctrine of part-performance under the English law was imported in the Statute law of India in the year 1929,<sup>79</sup> through Section 53-A of the Transfer of Property Act, 1882 and Section 27-A of the Specific Relief Act, 1877. It need, however, be noticed that while the former furnishes only a statutory defence to the defendant, the latter recognizes that "the equity of part-performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff".<sup>80</sup>

79. By Act XX of 1929.

80. *Maneklal v. Ginzala & Sons*, A. I. R. 1950 S. C. 1, 4.

Specific Relief Act, 1963, drops section 27-A of the former Act with the result that leases like or at par with sales would in relation to the doctrine of part-performance be governed by the provisions of section 53-A of the Transfer of Property Act, alone.

The maxim is also sometimes expressed as—“*Equity looks to the substance rather than to the form.*” In this form, it may, most aptly, be illustrated by means of restrictive covenants.

At common law a stranger to a covenant is not bound by it except in the case of covenants which run with the land and it is settled that the *burden* of a restrictive covenant entered into between a vendor and a purchaser of land does not run with the land at law so as to bind subsequent purchasers, though if it were contained in a lease the assignee of the lease may be bound by it.

But in equity a restrictive covenant relating to land will be enforced by injunction against all persons who subsequently take the land, unless they obtain the legal estate for value without notice, actual or constructive, of the covenant. This was established in and is called the rule in *Tulk v. Moxhay*.<sup>81</sup>

The doctrine of *Tulk v. Moxhay* applies only to negative covenants and not to affirmative covenants. It does not apply to a covenant which compels the covenantor to spend money such as a covenant to build houses and keep them in repair or to a covenant binding the owner of the land to sell it at some future time. But the Court considers the substance and not the form of the covenant; and if it is, in substance or in part, negative, the Court will restrain a violation, although it will not actively enforce the positive part of the covenant. Thus a covenant to maintain a square as a public garden will be enforced by injunction against building upon it, and a covenant to erect building for private residence will be enforced by an injunction against erecting a corrugated iron building intended for an art studio. A covenant running with the land in equity will be enforced by injunction even though the breach will not cause *substantial* injury to the plaintiff.

Section 40 of the Transfer of Property Act, 1882, incorporates the rule as to restrictive covenants.

So in a contract between vendor and the purchaser for the removal of a *chhatta* in a common lane at any time the vendor required for the more beneficial enjoyment of the land, it was held<sup>82</sup> that the covenant though affirmative in form was, in substance, negative and it was, therefore, enforceable.

## 10. EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION

The maxim expresses a general presumption upon which a court of equity acts. It means that where a man is under an obligation to do an act and he does some other act which is capable of being considered as a fulfilment of obligation, equity, relying on the principle that a man ought to be just before he is bountiful, raises a presumption that the latter act was meant as a discharge of the former. The presumption is made in those cases where a court of equity is called upon to determine whether an equitable estate or interest in certain subject-matter belongs to A, in pursuance of an obligation which rested upon B, although B in acquiring or disposing of the subject-matter has not expressed or indicated an intention on his part of performing such obligation.

1. The equitable doctrines of performance, satisfaction and ademption are based on this maxim : See Chapter XIV.

81. (1848) 11 B. 571.

82. Nand Gopal v. Batuk Prasad, A. I. R. 1932 All. 78.

2. Another illustration or application of this doctrine lies in what is known as the doctrine or presumption of advancement.

The equitable doctrine of advancement is that if a purchase or transfer, without consideration, of property is made by a father or a person in *loco parentis*,<sup>83</sup> in the name of or to the child, a presumption arises that it was intended as an advancement (that is for the benefit of the child) so as to rebut what would otherwise be the ordinary presumption in such cases of a resulting trust in favour of the father or the person who paid the money or suffered the consideration.

The underlying principle of this doctrine is that it is the moral duty of the parent to provide for the living of the child and wherever the father purchases any property in the name of the son, the presumption is that he did so in discharge of that obligation and the transaction in this case is *prima facie* to be treated as a gift to the child unlike other cases where it is treated as a resulting trust.

Thus if A purchases a house in the name of B, B would, in general, hold the house only as a trustee for A. If, however, the relationship between A and B is that of parent and child, it would be *prima facie* a gift of the house by A to B.

For the purposes of this maxim nothing further need be said on this doctrine, but it has its own importance in relation to implied trust and as such it may be continued to its appropriate length.

The extent of the rule, *i. e.* to what cases or relationship such a presumption will apply, is far from clear. But is usually spoken of as applying to cases of a parent and child,<sup>84</sup> husband and wife.<sup>85</sup> It covers the case of a grandchild, father being dead<sup>86</sup> as also of a mother and the child<sup>87</sup> (at any rate after the Married Women Property Act, 1882, whereafter being capable of independent ownership of property she must be deemed to be under a moral obligation similar to the father).<sup>87a</sup> The rule has been extended to the case of an illegitimate child,<sup>88</sup> which Maitland remarks, is somewhat wider. It has been held<sup>89</sup> not to arise where the money was advanced in the name of a wife who had not been legally married or of a mistress. If the question were to be decided on the basis solely of the intention of the purchaser or the transferor there should, indeed, be a much stronger presumption in the latter than in the former class of cases. But the difficulty rests in the way of the courts extending their recognition or aid to transactions based on such relationship. "Any moralist", said Vice-Chancellor, Sir W. Page Wood, "would say that a man was bound to make provision for the woman with whom he had so cohabited. But it would be impossible for this court to hold...upon the mere ground of his being under such moral obligation, the purchase.....as a provision for advancement."<sup>90</sup>

It is important to note that just as in the case of a stranger, the presumption of a resulting trust may be rebutted by proving that a benefit to the

83. *Currant v. Jago*, 1 Coll. 261 presumption made as between aunt and nephew on the principle and proof of facts of *loco parentis*, e. g. maintaining and educating the nephew.

84. *Dyer v. Dyer*, (1788) 2 Cox. 92.

85. *Moate v. Moate*, (1948) 2 All E. R. 486

86. *Ebrand v. Dancer*, (1680) 2 Ch. Cas. 26.

87. *Sayre v. Hughes*, (1868) L. R. 5 Eq. 376

87a. See Snell's *Principles of Equity*, 24th ed., p. 152 for the contrary.

88. *Beckford v. Beckford*, *Lofft's Reports* 490.

89. *Soar v. Foster*, (1858) 4 K. & J. 152.

90. *Soar v. Foster*, (1858) 4 K. & J. 152, 161.

transferee of property was, in fact, intended; so also the presumption of advancement is rebutted by proving that the benefit was not intended for the son or the wife.

Thus if the husband transfers his banking account to the wife and the husband is in failing health, the ordinary presumption of advancement would be rebutted and the wife would hold the money only as a trustee for the husband, the presumption being that the transfer was effected only for the facility or convenience in withdrawing or using the money.<sup>91</sup>

Similarly, the presumption of advancement would not be made or rebutted in the case of a purchase of property by the mother in the name of the son, where the son is the mother's solicitor.<sup>92</sup>

The presumption of advancement may be rebutted or corroborated by extrinsic or parole evidence. Such evidence must, however, be restricted to acts or declarations, etc. which are antecedent to or contemporaneous with the purchase or transfer in question. Subsequent acts or declarations<sup>93</sup> are not admissible in evidence except as admission by or for being used against the person making it. Thus, in *Shepherd v. Cartwright*,<sup>94</sup> where a large number of shares in companies were allotted by the father in the name of his children, it was held that subsequent acts and dealings of the father in selling those shares and disposing of the proceeds were not admissible in evidence to rebut presumption of advancement. As to the conduct of the sons in signing those transactions which was shown to be at the instance of the father and without understanding their nature, Viscount Simonds said, "I conceive it possible, and this view is supported by authority, that there might be such a course of conduct by a child after a presumed advancement as to constitute an admission by him of his parent's original intention, though such evidence should be regarded jealously. But it appears to me to be an indispensable condition of such conduct being admissible that it should be with knowledge of the material facts."<sup>95</sup>

In *re Emery's Investments Trust*, *Emery v. Emery*,<sup>95a</sup> the presumption of advancement raised in favour of the wife in the securities registered in her name by the father was not allowed to be rebutted by proving that the purpose of the registration was to avoid payment of American Federal Tax; the ground being that equity would not grant relief (here action was by the husband) in respect of a transaction carried out in contravention of law, albeit a foreign law. Although revenue and penal law of a foreign State is not to be enforced but those of a friendly State are recognised to this extent.

The doctrine of advancement does not apply in India. The genesis of the rule in the words of Lord Atkinson is as follows:

"It has been established by the decisions in 6 M. I. A. 53<sup>96</sup> and 13 M. I. A. 232<sup>97</sup> that owing to the widespread and persistent practice which prevails amongst natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers to it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the

91. *Marshall v. Cruttwell*, (1875) L. R. 20 Eq. 328.

92. *Garrett v. Wilkinson*, 1848) 2 De. G. & Sm. 244.

93. Except where it be so immediately thereafter as to form part of the same transaction.

94. (1955) A. C. 431.

95. 1955 (A. C.) at p. 449.

95a (1959) 1 Ch. 410.

96. *Gopeekrist v. Ganga Persaud*, 6 M. I. A. 53.

97. *Sayyud Uzbur Ali v. Mst. Altaf Fatima*, 13 M.I.A. 232.

property granted or transferred, as well as the usages these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery, in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in these cases when the husband or father pays the money and the purchase is taken in the name of the wife or child. In such a case there is, under the general law in India, no presumption of intended advancement as there is in England."<sup>98</sup> The presumption of advancement does not apply even to Indian Christians.<sup>99</sup> It has, however, been held to apply to British parents<sup>1</sup> and those of mixed European and Asiatic descent.<sup>1a</sup>

Upholding the right of a person who takes benefit under the transaction or who provides consideration for a transaction to maintain a suit concerning the transaction the Supreme Court in *Harish Chandra v. Bansidhar*<sup>1b</sup> has observed "Benami transactions are not frowned upon in India but on the other hand they are recognised. Indeed section 84 of the Indian Trusts Act, 1882, gives recognition to such transactions.

The rule of English law by which a child who received an advancement, must bring the amount into hotchpotch in the case of the father's intestacy has been omitted in the Indian Succession Act and has been held<sup>2</sup> not to apply to Parsees.

In may be useful to cross slightly the limits of the area of our investigation and thus to add that we are here concerned with the presumptions which may be displaced by proof to the contrary. Accordingly in case of *benami* acquisition or transfers as well, the actual nature or effect of this transaction is open or may be established in each case. The onus vests on the person who pleads that the transaction is *benami*. Motive, the source of consideration, possession of the property and its enjoyment, any body of the title deeds, there are various features, which may severally or cumulatively weigh and tilt the scale one way or the other. But these features are not exhaustive of the circumstances on which the final conclusion of the court has to be based.....At times other considerations may play vital part....."<sup>2a</sup>

### 3. Presumption of Trust :

Section 92 of the Indian Trusts Act, 1882, gives effect to the principle of this maxim. It lays down that where a person contracts to buy a property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold that property for the intended beneficiaries and in discharge of his obligation for the same.

## 11. EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO HAVE BEEN DONE

The maxim has been stated in somewhat varying language by different text writers but without any substantial variation in the meaning. Pomeroy who considers this maxim to be most important and comprehensive of all

98. *Kerwick v. Kerwick*, (1921) 47 I. A. 275.

99. *Palani v. Natarajan*, A. I. R. 1942 Mad. 503.

1. *Sargon v. Sargon*, A. I. R. 1933 Nag. 337.

1a. *Ibid*

1b. A. I. R. 1965 S. C. 1738 at 1740.

2. *Dhanjibhai v. Navajbai*, I. L. R. (1878) 2 Bom. 75.

2a. *A. Pillai v. A. Ilango*, A. I. R. 1969 Mad. 252, 254.

maxims, gives it the following form : "Equity regards and treats, that as done which in good conscience ought to be done."<sup>3</sup>

The true meaning of this maxim, as stated by Story<sup>4</sup> is that equity will treat the subject-matter, as to collateral consequences, and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been done ; or to quote the more expressive form of its meaning :

"Wherever between two parties, *A* and *B*, an 'equity' exists with regard to a subject-matter held by one of them, *B*, in favour of the other, *A*, then as between these two a court of equity regards and treats the subject-matter and the real beneficial rights and interests of *A* as though the 'equity' had actually been worked out, and as impressed with the character and having the nature which they then would have borne."<sup>5</sup>

Thus, *A* leaves by will Rs. 20,000 to *T* upon trust to purchase land for the use of *B*. *T* omits to purchase land and *B* dies. Let us assume that all the immovables of *B* are to descend to *X* and the rest of his property to *Y*. The question would then arise who is entitled to Rs. 20,000. *Y* may say that it continues to be a sum of money and so I am entitled to it. *X*, on the other hand, would say that it was for the purchase of land and but for *T*'s omission it would have been in the form of land, thus coming to my share. Equity would regard the purchase of land which ought to have been made as made and impress upon the fund of Rs. 20,000 the character and all the incidents of land. The money being consequently treated as land would go to *X* and not to *Y*.

The most direct and evident applications of this maxim lie in the equitable doctrine (i) of conversion, (ii) as to executory contracts, and (iii) of part performance.

#### Conversion :

- (i) See Chapter XII.

#### Executory Contracts :

- (ii) A contract for the purchase and sale of land is, in so far as the equitable doctrine of conversion is concerned, covered under the preceding head. But it needs a separate and fuller treatment with regard to the rights and interests of the contracting parties or their transferees in the subject-matter of the contract, be it land or things other than land.

*A* enters into a valid agreement for the sale of his house to *B* for Rs. 20,000. In so far as the equitable doctrine of conversion is concerned, *A*'s house, for the purpose of devolution of *A*'s properties, would be treated as a sum of Rs. 20,000 while *B*'s fund of Rs. 20,000, for the purpose of devolution of his properties, would be treated as house. But we are to consider what right or interest at law or in equity, if any, does *A* retain or *B* acquire in the house by virtue of the mere agreement for the sale and purchase of the house.

Common law required and insisted upon certain formalities for the transfer or acquisition of property and as such no legal right or interest in the subject-matter of the contract could be lost or gained by mere agreement.

3. Pomeroy's Equity Jurisprudence, 5th ed., 2nd Vol., p. 10.

4. Story's Equity Jurisprudence, 3rd ed., pp. 37-38

5. Pomeroy's Equity Jurisprudence, 5th ed., 2nd Vol., pp. 16-17

A, therefore, remains, to all intents, the owner of the house. The contract, in no manner, interferes with his legal right to an estate in the house. He can convey it to a third person free from any legal claim or encumbrance. He is simply subject to the legal duty of performing the contract and the legal liability of paying damages for its non-performance. Similarly B, on the other hand, acquires no interest or proprietary right in the house. He can maintain no proprietary or possessory action for its recovery. His right is a mere thing in action to recover from A compensation in damages for the breach of agreement.

The relations between A and B are wholly personal until, by the execution and delivery of a deed of conveyance, the legal estate in the house passes from A to B.

Equity views all such relations from a different standpoint. By the terms of the contract the house ought to be conveyed to B and Rs 20,000 ought to be transferred to A ; equity, therefore, regards these things as done B having acquired the property in the house and A as having acquired the property in the price.

So by virtue of the contract itself the equitable estate in the house vests in B and he may validly or effectively convey or encumber that estate or interest in the house. A remains the legal owner of the house but he holds it only as a trustee for B. This trust impressed upon the house would follow the house in the hands of A's transferee except where he is a *bona fide* purchaser for value without notice. A is deprived of the beneficial interest in the house and has simply a lien upon the house for the purchase price or any part thereof that remains unpaid.

It follows also, as a necessary consequence of the equitable doctrine that the vendee in such a case is entitled to any improvement or increment in the value of the land after the conclusion of the contract, and must himself bear any and all accidental injuries, losses or wrongs done to the soil by the operation of nature or by tortuous act of third persons not acting under the vendor.

The maxim is also applicable to contracts regarding non-existing property. "A man cannot", said Jessel, M. R., in *Collyer v. Isaacs*.<sup>6</sup> "in equity any more than in law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property and the contract to assign then becomes a complete assignment".

(iii) As referred to earlier<sup>7</sup> the doctrine of part-performance may also be said to be the result of this maxim.

It may, by way of *limitation* on the operation of this maxim, be noted :

Firstly, equity does not regard and treat as done what *might* be done or what *could* be done, but only what ought to be done.

Secondly, the maxim does not operate in favour of every person but only in favour of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved. No such construction would, therefore, be made in favour of volunteers who must take subject to equities attaching to the properties.<sup>8</sup>

#### Indian Law :

On the question whether and how far the equitable doctrine with regard

6. (1881) 19 Ch. D. 342, followed in *Gaya Din v. Kashi Gir*, (1907) 29 All. 163.

7. See p. 79 *ibid*.

8. *Re Anstis*, (1886) 31 Ch. D 596.



to executory contracts, as explained above, applies in India—there still remains a good deal of controversy and it may not be easy to ascertain the exact position.

There had been a controversy among text-writers in relation to the meaning and effect of Section 13 of the Specific Relief Act, 1877 and Section 54 of the Transfer of Property Act, 1882.

Section 13 of the Specific Relief Act, 1877, provided : “Notwithstanding anything contained in Section 56 of the Indian Contract Act (1872), a contract is not wholly impossible of performance because a portion of its subject-matter existing at its date, has ceased to exist at the time of performance.” The two illustrations appended to this section were :

- (a) A contracts to sell a house to B for a lakh of rupees. The day after the contract, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase money.
- (b) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase money.

The illustration (a) had been framed upon the English case of *Paine v. Meller*<sup>9</sup> and illustration (b) upon that of *Mortimer v. Capper*,<sup>10</sup> which are authorities on the English equitable doctrine given before.

Section 54 of the Transfer of Property Act, while defining a sale, adds that a contract for the sale of immovable property.

“.....does not, of itself, create any interest in or charge on such property”.

Dr. Banerji's view<sup>11</sup> on the controversy was as follows :

Section 54 of the Transfer of Property Act does not conflict with Section 13 of the Specific Relief Act in which the principles relating to partial performance of contracts has to be applied. The illustrations to Section 13 are, however, not in harmony with the section. But the words of Section 13 are clear and as such the illustrations cannot be held to restrict or alter them since it is the section which governs and not the illustration. Hence, like the English common law, the property, before the actual conveyance, belongs to the vendor and it is only after conveyance that the title to or interest in the property passes to the purchaser.

Other commentaries on these Acts maintained the view that there was a conflict. Mulla, for instance, maintained<sup>12</sup> that Section 13 of the Specific Relief Act could not be applied where the Transfer of Property Act was in force.

Section 13 of the Specific Relief Act, 1877, was not clearly worded but the two illustrations duly explained and would not be said to extend the meaning of that section. This view could be supported by the Select Committee's report on this clause of the Bill : “We have inserted this clause.....The illustrations appended to this new clause will sufficiently show its propriety.” The section, it is submitted, was intended to and did incorporate the equitable doctrine of English Law that equitable estates in the subject-matter of the contract passed to the buyer by and from the time of the contract itself and the seller's possession thenceforth was only that of a trustee.

9. (1801) 6 Ves. 349, see also *Nizamuddin v. Jumma*, A. I. R. 1926 Nag. 17.

10. (1782) 1 B. C. 156.

11. The Law of Specific Relief in India, 1909 ed., pp. 351-355.

12. Mulla's Contract and Specific Relief, 8th ed., p. 767.

Section 54 of the Transfer of Property Act was intended to and does incorporate the common law doctrine that no legal right or interest in the subject-matter of the contract can be acquired or taken away by the contract itself. It is the actual and due execution of the sale-deed that creates or effects the transfer of interest in the property.

In *Ram Baran v. Ram Mohit*,<sup>12a</sup> the Supreme Court observed that in view of the provisions of Section 54 of the Transfer of Property Act covenant of pre-emption, like any other contract in respect of land even though unlimited in point of time as to the exercise of that option does not offend the rule against perpetuities.

In the earlier edition of this book it was pointed out that the conflict should engage the attention of the Legislature and suitable amendments be made to harmonise and settle the law on the point. The object has been partially achieved by the Specific Relief Act, 1963, which repeals the Act of 1877. The provisions of Section 13 stand omitted and the corresponding law on the subject has now been enacted through the explanation to Section 12 which runs thus: "For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole or the part of it if a portion of the subject-matter existing at the date of the transfer has ceased to exist at the time of its performance." Section 12 re-enacts the provisions on the specific performance of the part of a contract and reading the explanation in the light of these provisions it is clear that the Legislature has given effect to the view of Dr. Banerji reproduced above.

The new Act further omits illustrations (g) and (h) to Section 3 (now Section 2) which were consistent with illustration to Section 13. The relevant provisions of the Specific Relief Act now stand harmonised with those of Section 54 of the Transfer of Property Act.

\* It need be noted that the following provisions under the Indian law (*inter alia*) are consistent with Section 13 of the old Specific Relief Act and opposed to that of Section 54 of the Transfer of Property Act and illustrate the application of the maxim under consideration.

1. Section 40 of the Transfer of Property Act, 1882, the illustration to which is as follows :

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C who has notice of the contract. B may enforce the contract against C to the same extent as against A.

The Supreme Court in *Ram Baran v. Ram Mohit* said : There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under Section 40 of the Transfer of Property Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under English law, in that both above rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further of the rule against perpetuity which applies to equitable estate in England cannot be applied to a covenant enforceable against the assignee.

2. Section 53-A of the Transfer of Property Act, 1882, containing the doctrine of part-performance, is based on the same principle.

3. Section 91 of the Indian Trusts Act, 1882, making the purchaser of a property with notice of a pre-existing contract with regard to the same property,

a constructive trustee for the person who has agreed to purchase, is also clearly an application of the equitable rule in question. The matter, it is clear, still needs the attention of the Legislature and further amendments have to be made in order to eliminate the remaining inconsistencies and harmonise the entire law on the subject.

## 12. EQUITY ACTS IN PERSONAM

The maxim is, strictly speaking, descriptive of procedure in equity and covers a very large part of the remedial action of equity. It has, on the other hand and when considered in its broadest sense, a much wider importance and far-reaching consequences than that and as remarked by Dr. Hanbury,<sup>13</sup> "In a sense it comprises the whole of equity." It may be said to have been the very life and soul of the Court of Chancery. It is in this doctrine that we find not only the source but the very sanction of the equitable jurisdiction.

The Court of Chancery has been described as a Court of conscience in two senses :

1. In one sense, the jurisdiction was exercised according to the conscience of the Chancellor, although his conscience, as shown earlier, became fettered more and more by precedent or authority.

2. In the other sense the jurisdiction was exercised on the conscience of the defendant. The Court of Chancery assumed and exercised jurisdiction over the defendant only if it found that there was something wrong or corrupt with the defendant's conscience in relation to his dealings or conduct with the subject-matter or the opposite party. The object of the Court being the purification of the defendant's conscience, it gave an order or decree directed to that end. If there was no willing obedience and the inclination to reform his conscience on the part of the defendant, the Court proceeded to purge his corrupt conscience by compelling him to carry out or put into effect its order or decree.

Thus, while the judgments at law operated by their own intrinsic force to vest the legal title or clothe the parties with legal rights and liabilities, and, in case of non-compliance were enforced or executed as such by the officers of the Court; the orders or decrees of the Court of Chancery, as stated before, did not operate *in rem* and could not, by their own intrinsic force, affect or alter the rights of the parties. A decree of the Chancery spoke in terms of personal command to the defendant and such directions could only be operative or given effect to by personal act of the parties, be it through his willing obedience or through imprisonment or sequestration of goods.

The original character of the relief or process in the Court of Chancery became, in course of time, greatly modified through statutes and it did not remain confined to acting *in personam*. It obtained the power to make vesting orders which, without a conveyance, transferred the property from one person to another and its judgments could thereafter be enforced by any of the legal writs of execution. In spite of these changes, the equitable jurisdiction continues to remain primarily over the defendant personally.

"The jurisdiction *in personam* wielded by equity gave to it", in the expression of Dr. Hanbury,<sup>14</sup> "a longer arm than that of the common law". Mukherjee, J., says, "The rule of 'acting *in personam*' was really the weapon with which the early Chancellors sought to establish their jurisdiction in opposition to that of the common law Courts".<sup>15</sup> The practical effect of the maxim in this sphere may be represented under two heads :

13. Modern Equity by H. G. Hanbury, 2nd ed., p. 89.

14. Modern Equity by H. G. Hanbury, 2nd ed., p. 90.

15. Moolji Jaitha & Co. v. K. S. & W. Mills & Co., A. I. R. 1950 F. C. 83, 124.

- (i) Relying on this doctrine, the Court of Chancery restrained unconscientious proceedings commenced in the common law Courts. This mode of proceeding became obsolete owing to the fusion of the administration of law with that of equity through the Judicature Act. The principle has, nevertheless, considerable historical interest.

An important example of this general jurisdiction, in modern times, occurs where a person who is amenable to the jurisdiction of English Courts, commences legal proceedings abroad, the institution of which is inequitable. Even where a person has actually obtained judgment abroad, an injunction may be issued, restraining the decree-holder from reaping the fruit of the foreign judgment. Jurisdiction is also exercised to stay proceeding in a foreign Court if an action on the same matter is pending in England provided the defendant establishes that the two proceedings are in fact vexatious.

The principle justifying an injunction in these situations is the same as that advanced by Lord Ellesmere in answer to the accusation of Lord Coke<sup>16</sup> with regard to common injunctions. The Court, in such cases, does not mean any disrespect to or assume any supremacy over a foreign Court, since a decree of such a nature is not directed against the authority of a foreign Court but is merely a command to a person within English jurisdiction as to what is equitable and fair and which he must do.

- (ii) The general rule of almost universal application is that jurisdiction in respect of an immovable property vests in and must be exercised by the Court where the immovable property is situated. Consistently with this rule, the common law Courts did not exercise jurisdiction in respect of foreign immovables; one of the reasons which need be emphasized here, being that judgments at law were enforced by the process of execution and if the land was not situated in England and a judgment was given for the claimant, the officers of those Courts could not execute it. The Court of Chancery, on the other hand, on account of its peculiar procedure, did not suffer from this disability or difficulty. Since equity acted against the person of the defendants, its Courts, subject to the condition given below, exercised jurisdiction even in respect of land lying in a foreign country. The equitable doctrine in point, is very well expressed through the following words of Lord Selborne, L. C. in *Ewing v. Orr Ewing*:<sup>17</sup>

"The Courts of Equity in England are and always have been, Court of conscience, operating *in personam*.....; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within the jurisdiction. They have done so, as to land in Scotland, in Ireland, in the colonies, and in foreign countries."

The leading case on the point is *Penn v. Baltimore*.<sup>18</sup> There an agreement had been entered into between the plaintiff and the defendant for fixing the boundaries of their colonies situated in America. The plaintiff sued the defendant in the Court of Chancery in England and one of the objections taken by the defendant was with regard to the jurisdiction of the Court but this objection was overruled by Lord Hardwicke on the ground that "the conscience of the party was bound by this agreement, and being within the jurisdiction of

16. See p. 26 Supra.

17. L. R. (1883) 9 A. C. 34, 40.

18. (1750), 1 Ves. Sen. 444.

this Court, which acts, *in personam*, the Court may properly decree it as an agreement", and as the defendant himself was in England, the relief claimed could be enforced, it necessary, by punishing him for contempt.

As other examples of the exercise jurisdiction of this nature by the Court of equity in England may be mentioned, actions for redemption and foreclosure of a mortgage on land outside England<sup>19</sup> or for specific performance of an agreement to create a mortgage on such land,<sup>20</sup> or for an account of the rents and profits<sup>21</sup> or, if necessary, for the appointment of a receiver of such land.<sup>22</sup>

The assumption of jurisdiction in such cases, though based on and justifiable under this maxim, has been generally criticized and disfavoured. It was, for instance, observed by Lord Esher in *Companhia de Mocambique v British South Africa Co.*,<sup>23</sup> that "the decision in *Penn v. Baltimore* which has been acted by other great judges in equity seems to me to be open to the strong objection that the Court is doing indirectly what it dare not do directly." There is little doubt, as has been pointed out by Dr. Cheshire,<sup>24</sup> that this amounts to overriding, in effect, the jurisdiction of foreign Courts, howsoever profound may be the motive behind it.

It is important to remember that there have been, from the earliest times, certain limits within which this jurisdiction has to be exercised and the assumption of jurisdiction being in the discretion of the court, the tendency of modern Courts is to restrict rather than enlarge the exercise of this jurisdiction. These limitations may be classified under three heads :

1. Effectiveness, *i. e.* it must be possible for the decree that may be by the Court, to be carried into effect in the country where the land is situated. This requirement is deemed to be fulfilled if the defendant is present in England or submits to the jurisdiction of the Court or is capable of being served with process outside the jurisdiction under Order XI, rule 1 of the Rules of the Supreme Court.
2. The remedy sought in such cases must be an equitable remedy.<sup>25</sup>
3. The defendant should be subject to same obligation arising from his own act ; or, as Strahan puts it, "when the dispute is one of the conscience,"<sup>26</sup> for it is only when his conscience is affected that the Court is entitled to interfere.

The genesis of the first limitation is self-evident. It will be futile for the Court to pass no less than for the plaintiff to get a decree without there being any power or means to enforce it. Kekewich, J., in dismissing a prayer for injunction to restrain infringement of a dramatic copyright in Germany, parties being British subjects, accordingly, observed : "If.....defendants are not in England, they may set any such judgment at defiance, and unless they come to England there will be no means of enforcing it against them."<sup>27</sup>

A partial modification of this rule is made where the court is seized or

19. *Toller v. Carteret*, (1705) 2 Vern 494.

20. *Re Smith, Lawrence v Kitson*, (1916) 2 Ch. 206.

21. *St. Pierre v. South American Stores*, (1936) 1 K. B. 382.

22. *Mercantile Investment Co. v River Plate Co.*, (1892) 2 Ch 303.

23. (1892) 2 Q. B.

24. *Private International Law*, 2nd ed., pp. 520-523.

25. *Penn v. Baltimore*, Strahan's Digest of Equity, 5th ed., p. 416 ; see also Ch. XXX, *infra*.

26. *Ibid.*

27. "*Morocco Bound*" Syndicate Ltd. v. Harris, (1895) 1 Ch. 534, 537.

charged with the administration of a trust fund or property. The court assumes jurisdiction in such cases and determines the rights to such property even though a possible or certain claimant is not subject or amenable to the jurisdiction of the court.<sup>28</sup>

The second requirement though, no doubt, very important, hardly needs further elaboration.

With regard to the third limitation it may be noticed that there must be some personal element in the case and the Court will not interfere on the basis of the maxim if the case involves nothing more than a naked question of title to foreign land. It has accordingly been held that no action can be brought in England for the recovery or partition of land outside England or to obtain damages for trespass to such land<sup>29</sup> or to recover a rent charged on land the liability for which arises not from a privity of contract between the parties but simply from privity of estate, *i.e.* simply on the defendant being in possession of the estate charged,<sup>30</sup> as owner of the land. It need, however, be noticed that if the action is, in its nature, personal and not real, the Court has jurisdiction to entertain it though the action incidentally relates to an immovable situated out of England.<sup>31</sup>

The personal obligation which is the basis of this jurisdiction may, in the words of Parker, J., in *Deschamps v. Miller*,<sup>32</sup> arise "out of contract or implied contract, fiduciary relationship or fraud or other conduct which in the view of a Court of equity in.....(England), would be unconscionable....." It is not only necessary but also sufficient if the defendant's conscience is affected by some act which is chargeable under English Law; it does not matter<sup>33</sup> whether or not it is such according to the law of the place where the property is situated.

Such personal obligation must, to use an expression of Beale, 'have run from the plaintiff to the defendant', *i.e.* there must be privity of obligation between the parties to the action. Thus in *Norris v. Chambers*,<sup>34</sup> Sadlier agreed to buy certain *Prussian* lands from Simon and paid a deposit. Simon refused to complete and sold the land to Chambres. Sadlier's representative brought a suit in England claiming that he was entitled to a lien on the land. The claim was dismissed on the ground that there was no privity between the plaintiff and the defendant and hence the proper course was to resort to *lex situs*, *i.e.* the Prussian Court.

It does not, however, essentially follow from the above that an equity which has arisen between A and B can never be enforced against C under the personal jurisdiction of the Court. It is always and only a question of personal obligation and it would suffice if the defendant is, though not a party to the original transaction which gave rise to the dispute, contractually or otherwise personally bound. So if A purchases land subject to the existing charges on it, A would be considered to be under the required personal obligation though there is no privity of contract between him and the charge-holders.

28. See *United States of America v. Dollfus Meig et Cie*, (1952) A. C. 582, 617, where the court declined to extend this special jurisdiction to admiralty cases.

29. *Companhia de Mocimbe v. British South Africa Co.*, (1892) 2 Q. B. 358.

30. *White v. Forbes*, (1875) L. R. 10 C. P. 583.

31. *St. Pierre v. South American Sports*, (1936) 1 K. B. 382, where it was held that an action for rent of premises in a foreign country, being analogous to an action on a covenant for lease, was entertainable in England.

32. (1908) 1 Ch. 856, 863.

33. *Ex parte Pollard*, (1840) Mont. 8 Ch. 239, followed in *In re The Anchor Line*, (1937) 1 Ch. 483.

34. (1861) 3 De. G. F. & J. 583.

**Indian Law :**

It is difficult to say whether and how far or within what limits the maxim is applicable in India vis-a-vis the exercise of jurisdiction in respect of foreign immovables. Dr. Banerji's monumental work on Specific Relief fails to reveal that the distinguished writer had a definite opinion on the subject. Relying on Collett,<sup>35</sup> Nelson<sup>36</sup> and the High Court of Calcutta<sup>37</sup> he says :<sup>38</sup> "Our Civil Procedure Code, however, does not seem to recognize any such jurisdiction, and it has been doubted if British Indian Courts can act *in personam*," and then adds : "But the jurisdiction has recently been affirmed in Bombay,<sup>39</sup> in respect of the original side of the High Court and surely it is not right to treat a suit for specific performance of a simple executory contract as an action *in rem* secure reality or its possession."

Relying on Stokes,<sup>40</sup> he adds further : "In the case of Mufussil Courts too, the proviso to Section 16, Civil Procedure Code, seems to contemplate such suits."

Elsewhere, while dealing with the appointment of receivers, he says, on the strength of Section 16 and Section 16-A (now Section 19) of the Civil Procedure Code and the provisions of the Letters Patent, that "The Courts in India have but limited powers of making a decree *in personam*".<sup>41</sup>

And, perhaps finally, he says : "Apparently equity may act *in personam* in India too".<sup>42</sup>

The relevant provisions of the statute law in India which govern or have a bearing on the proposition are as follows :

**(A) Suits other than those in the Chartered High Courts in exercise of their original civil jurisdiction :**

Section 16 of the Civil Procedure Code, 1908, enacts that suits<sup>43</sup> in respect of immovable property "shall be instituted in the Court within the local limits of whose jurisdiction the property is situate", and then adds the proviso which allows suits<sup>44</sup> to obtain relief respecting or compensation for wrong to immovable property held<sup>45</sup> by or on behalf of the defendant to be instituted in the Court within the local limits of whose jurisdiction (a) the property is situate ; or (b) the defendant actually or voluntarily resides ; (c) carries on business or (d) personally works for gain provided the relief sought can be entirely obtained through the personal obedience of the defendant. The section concludes with the explanation : "In this section 'property' means property situate."

It may be noted that if the immovable property is situated within the jurisdiction of more than one Court, Section 17 allows the suit to be instituted in any of these Courts.

35. Specific Relief Act, 4th ed., p. 112.

36. Indian Contract Act, 1905 ed., p. 119.

37. Sreenath Roy v. Cally-Doss Ghos, (1879) 5 Cal. 82.

38. The Law of Specific Relief in British India, 1909 ed., p. 214.

39. Holker v. Dada Bhai, (1890) 14 Bom. 353.

40. Anglo-Indian Codes, 1st Vol., p. 933, n 4.

41. Ibid at p. 684.

42. Ibid at p. 55.

43. The suits have been classified under 5 heads, viz. suits for the :—

(a) recovery with or without rents or profits ; (b) partition ; (c) foreclosure, sale or redemption in the case of a mortgage or charge upon ; (d) determination of any right to or interest in, and (e) compensation for wrong to . . . immovable property. These heads are clearly wide enough to cover all possible actions.

44. The wording of the proviso in this respect is as wide as the main section.

45. The proviso does not apply when the property is in the possession of the plaintiff—Grip v. Watson, (1893) 20 Cal. 689.

This proviso, as observed by Kania, C. J., "to a limited extent and in a modified form contains the principle 'equity acts in personam'."<sup>46</sup> It is, however, submitted that the scope of this proviso is, to a large extent, different from the scope of this maxim in England for the purposes of jurisdiction in respect of foreign immovables. It may be noted *firstly*, that this proviso insists only on the requirement of effectiveness and does not require personal obligation or unconscionable conduct on the part of the defendant which is the very foundation of equitable jurisdiction in England. *Secondly*, as is clear from the explanation added to this section, assumption or exercise of jurisdiction under the proviso is restricted to property situated in India. The courts cannot,<sup>47</sup> therefore entertain, under this *provision*, suits in respect of immovables situated outside India in any case.

It, therefore, appears that Section 16 does not at all touch the kind of jurisdiction which is under investigation. It is limited to the division of jurisdiction of the municipal Courts and it does not, at the same time, necessarily lead to the inference that Courts in India cannot exercise jurisdiction in respect of foreign immovables. There does not, however, appear to be any case involving or having a decision directly on this issue.

#### (B) Suits under the original civil jurisdiction of Chartered High Courts :

Section 16 does not, as provided by Section 120 of the Code of Civil Procedure, 1908, apply to Chartered High Courts in the exercise of their original civil jurisdiction. The ordinary original civil jurisdiction is exercised only by the Presidency High Courts of Calcutta, Bombay and Madras. That jurisdiction is defined by Clause 12 of the Letters Patent which empowers these High Courts to receive, try and determine suits of every description if "in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally works for gain, within such limits....."

The wording of the clause indicates that it was designed to give these High Courts the same jurisdiction which Section 16 of the Code of Civil Procedure vests in the mofussil Courts. Both these provisions ought, therefore, to have received the same interpretation and been given the same scope. But Clause 12 has been treated and construed on a higher and more extensive level. No significance seems to have been attached to jurisdiction on defendant's presence and the construction seems to have turned round this expression—"suits for land or other immovable property"—alone. There is, however, a good deal of controversy and confusion on the scope of this clause.

The Calcutta High Court rulings on the scope of the jurisdiction under this clause as summarized by a distinguished writer come<sup>48</sup> to this : Suits of the kind mentioned in Clauses (a) to (e) of Section 16 of the Code of Civil Procedure, are all suits for land and as such no jurisdiction can be exercised in respect of them unless the land is situated within the jurisdiction. It was, for

46. Moolji Jaitha & Co. v. K. S. & W. Mills Ltd., A. I. R. 1950 F. C. 83, 87,

47. See Krishnaji v. Gajanan, (1909) 33 Bom. 373.

48. Mulla : Code of Civil Procedure, 11th ed., p. 1391 (relying on) Sudamdih Coal Co. v. Empire Coal Co., (1915) 42 Cal. 942, 951-52 ; see also Mahajan, J., in 1950 F. C. 83, 108.



instance, held in *Gokuldas v. Chagan Lal*<sup>49</sup> that 'suit for land' in Clause 12 was not limited to suits in which plaintiff sought to recover possession of land or other immovable property..... It meant suits in which.....decree or order would affect directly the proprietary or possessory title to land. The view was, however, dissented from in a later case of the same Court,<sup>50</sup> where Das, J., took the same view as the Bombay High Court, noted below. It is important to note that even in the former case it was observed that "Both in India and in England, the High Court for the purpose of doing equity possesses jurisdiction to pass decree *in personam* subject, it was added to the well-recognized principles or exceptions like effectiveness.

The Madras High Court for some time took the same view,<sup>51</sup> as the Calcutta High Court, but in *Velliappa Chettiar v. Govinda Das*,<sup>52</sup> a Full Bench of five Judges of Madras High Court held that a suit by a purchaser of land situate outside Madras for specific performance of a contract to sell, made in Madras, against the vendor who resides in Madras, is not a suit for land and is cognizable by the Madras High Court. The view propounded by Couts Trotter, C. J., in that case, corresponds a good deal to the English doctrine<sup>3</sup> as to equitable basis for such jurisdiction. He said that a suit in which the plaintiff asks for a decree which, if passed, would compel the defendant to do or abstain from doing something which the Court orders him to do, would not be a suit for land, but a suit in which the plaintiff asks for a decree which if passed, would bring about *proprio vigore* an immediate change in the ownership of the property would be a suit for land.

The view taken by the Bombay High Court goes nearest the equitable rules or limitations with regard to jurisdiction in respect of foreign immovables on the basis of the maxim, "Equity acts *in personam*". In *Holkar v. Dadabhai*,<sup>54</sup> it was held that the Court had jurisdiction to try a suit for specific performance of an agreement to execute a mortgage made in Bombay of land situated outside the original jurisdiction. The *ratio decidendi* was that the expression 'suit for land' was intended to exclude from the Court's jurisdiction only such suits relating to land which, if brought in England, the Courts would refuse to entertain on the ground 'that the land was situated abroad'. This *ratio decidendi* has been, it is submitted, consistently followed in subsequent cases. In *Kashinath v. Anant*,<sup>55</sup> it was held that equity Courts in England compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction and the jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment. In *Venkatrao v. Khimji*,<sup>56</sup> a suit for sale was decreed on a mortgage of land outside jurisdiction and Scott, C. J., said that such a suit was not a suit for land as it was not a suit "to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land." Jenkins, C. J., in *Vaghoji v. Comaji*,<sup>57</sup> summarized the principle of this equitable jurisdiction in

49. (1927) 54 Cal. 655.

50. *Khatun Bibi v. Leelabati Dasi*, I. L. R. (1945) 1 Cal. 47.

51. See, for instance, *Nahum Lakshmikantan v. Krishnaswamy*, 27 Mad. 157, where it was held that a suit for land includes any suit in which a decree is asked for operating directly upon the land and therefore includes any suit brought to enforce a security upon land and accordingly a suit to enforce equitable mortgage by sale was not entertained.

52. (1929) 52 Mad. 809.

53. See p. 89, *ibid*.

54. (1890) 14 Bom. 353.

55. (1900) 24 Bom. 407, 411.

56. (1924) 26 Bom. L. R. 535, 536.

57. (1905) 29 Bom. 249.

England thus : The Courts in England do not entertain suits of land outside jurisdiction unless (i) the defendant is in England and (ii) there is some privity between the parties on the ground of contract, trust or fraud.

It need be noted that the defendant in *Holkar's* case did not reside or carry on business in Bombay but that fact appears to have been overlooked in the judgment. *Holkar's* case in that respect or to that extent,<sup>58</sup> was overruled by the Full Bench in *India Spinning and Weaving Co. v. Climax Syndicate*,<sup>59</sup> where jurisdiction was denied on the ground that the defendant-mortgagor resided outside the jurisdiction.

Even if and in so far as otherwise, the latter case was overruled by a Full Bench of seven Judges in *Hatimbhai Hasanally v. F. Edulji Dinsha*.<sup>60</sup>

There are some decisions of the Privy Council wherein the powers of the Presidency High Courts to act or exercise jurisdiction *in personam* in respect of foreign land have been clearly upheld although the requisites for or the limits on the exercise of such jurisdiction have not been considered or laid down.

In *Benode Behari Bose v. Nistarini Dassi*,<sup>61</sup> it was affirmed that the Calcutta High Court had the jurisdiction to set aside certain fraudulent leases of land situate outside the local limits of its original civil jurisdiction. Another case in point is *Bilasrai v. Joharmal Shivnarayan*,<sup>62</sup> wherein the powers of the Bombay High Court to take cognizance of a suit for the removal of trustees of a hospital in Jaipur State and the transfer to new trustees of certain lands and buildings in that State were upheld by the Privy Council with the following observation :

"It does not appear that any objection was taken at the trial to the jurisdiction under Clause 12, High Courts' Letters Patent and their Lordships are satisfied that there is no defect of jurisdiction in that sense. As a Court of equity acts *in personam* it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connection with rights to property situated abroad."

The point came up for adjudication before the Federal Court in *Moolji Jaitha & Co. v. K. S. & W. Mills Co.*,<sup>63</sup> but the controversy has not been set at rest and the position remains as indefinite as it was before. In this case the defendants, a firm of merchants, were secretaries and treasurers of the plaintiff company and the allegation was that they had, acting as such, acquired in their own names certain lands out of the moneys and other properties belonging to the company. The suit was on the original side of the Bombay High Court although the land was situate outside the local limits of its ordinary original jurisdiction, the reliefs in question being :—

- (a) that it may be declared that the said lands belonged to and are property of the plaintiff company and that the defendants have no beneficial interest in it.
- (b) that the defendants may be ordered to execute all such documents

58. See Mulla—Code of Civil Procedure, 11th ed., p. 1392. The judicial interpretation regarding the scope of this decision is wider ; See, for instance, *Moolji Jaitha & Co. v. K. S. & W. Mills Co.*, A. I. R. 1950 F. C. 88.

59. (1926) 50 Bom. 1.

60. (1921) 51 Bom 516.

61. (1905) L. R. 32 I. A. 193.

62. (1944) L. R. 71 I. A. 47.

63. A. I. R. 1950 F. C. 83

and deeds and do such acts as may be necessary for transferring the said lands to the name of plaintiff company.

On a preliminary issue as to the jurisdiction of the Court to take cognizance of or grant these reliefs, it was held by Tendolkar, J., that the Court had no jurisdiction. This judgment being reversed in appeal by the Division Bench (Chagla, C. J. and Bhagwati, J.), the case came up before the Federal Court. Kania, C. J. and Patanjali Sastri, J., concurred in holding that it was not a suit 'for land' within the meaning of Clause 12 of the Letters Patent;<sup>64</sup> and the jurisdiction of the High Court was accordingly not barred by the provisions of Clause 12. Mahajan and Mukherjea, JJ., took the contrary view and since Fazl Ali, J., without giving a finding on the issue of jurisdiction, dismissed the appeal for want of a proper certificate under Section 110 of the Code of Civil Procedure, the appeal was ultimately dismissed according to the majority view. Fazl Ali and Patanjali Sastri, JJ., expressed the hope that the appropriate legislative authority will turn its attention to the need for the clarification of the law by making suitable amendments in Clause 12 of the Letters Patent.

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64. On the ground that the plaintiff simply sought the fulfilment of a personal obligation arising from fiduciary relationship and the execution of the necessary instruments conveying to them the legal title in the land in question; the contrary view being that the suit involved the adjudication of conflicting claims to land and the decree prayed for would bring about a change in the title to land.

## CLASSIFICATION OF EQUITABLE RIGHTS

Equitable rights have, from the earliest times, been broadly classified under three heads, *viz.* trust, fraud and inevitable accident. In the words of an old rhyme, attributed to Sir Thomas More :

“Three things are to be kept in conscience :

Fraud, accident, and things of confidence.”<sup>1</sup>

Lord Coke<sup>2</sup> has similarly stated three things were to be judged of in the court of conscience or equity : “covin, accident and breach of confidence”. Blackstone<sup>3</sup> has also said that Courts of equity were established “to detect latent frauds and concealments which the process of the Courts of law is not adapted to reach ; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a Court of law ; to deliver from such dangers as are owing to misfortune, or oversight.....”

It must, however, be noted that the three, what Ashburner names ‘primitive heads’, merely afford a means of roughly classify equitable rights. They are not and perhaps were never sufficient to cover or accurately represent all the equitable rights. This may be explained through the following observations of Story on the point :

- “These, as general descriptions, are well enough, but they are far too loose and inexact to subserve the purposes of those who seek an accurate knowledge of the actual, or supposed, boundaries of equity jurisdiction. Thus, for example, although fraud, accident and trust are proper objects of Courts of equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a Court of law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee, or by a stranger, avoids it as to the other party at law. And, sometimes, fraud, such as, fraud in obtaining a will or devise of lands, is cognizable there. Many cases of accidents are remediable at law, such as, losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law, as for instance, cases of bailments, and that large class of cases, where the action for money had and received for another’s use, is maintained *ex aquo et bono*.”

“On the other hand, there are cases of fraud, of accident, and of trust which neither courts of law, nor of equity, presume to relieve or mitigate.....”<sup>3</sup>

But while the inadequacy of the three heads of trust, fraud and accident to delineate or represent precisely the boundaries of equity jurisdiction is clearly and definitely established, it is equally recognized that the equitable claims are not amenable to any general classification or description and that the true

1. Ashburner’s Principle of Equity, 2nd ed., p. 73.  
 2. Story’s Equity Jurisprudence, 3rd ed., p. 32.  
 3. Story’s Equity Jurisprudence, 3rd ed., pp 38-39.

nature and extent of equitable claims in modern times must be ascertained by a specific enumeration of its actual limits in each particular class of cases.

Equitable rights may be placed and considered under the following three sub-divisions :<sup>4</sup>

### (A) EQUITIES TO PROTECT CONFIDENCES

The only but the most important head of equitable right falling under this sub-division is trust.

In a broad sense, trust may<sup>5</sup> be said to include the whole or almost the whole subject-matter of equity, or as Story<sup>6</sup> says, "(trust) will be found directly or remotely to embrace most of the subjects of their exclusive jurisdiction". The term 'trust' is, however, generally confined to and treated in its technical sense as coming within and forming the largest branch of the exclusive jurisdiction of the Court of Chancery.

### (B) EQUITIES TO PREVENT OPPRESSION

The following equitable rights may be placed under this general head :

1. Penalties and Forfeitures.
2. Mortgages and Liens.
3. Married Women.
4. Infants.
5. Idiots and Lunatics.

Courts of equity in certain cases relieved against penalties and forfeitures for breaches of conditions and covenants. Originally, in all cases of this sort, there was no remedy at law, but the only relief which could be obtained was exclusively sought in Courts of equity. Courts of equity from an early time looked upon a mortgage from a different point of view than that at law and recognized in the mortgagor the right to recover upon equitable terms the mortgaged property after the time fixed by the contract for redemption had expired. The Court of Chancery also exercised jurisdiction over the persons and property of married women, infants, idiots and lunatics. It also fell within the former exclusive jurisdiction of Chancery Courts. Story<sup>7</sup> ascribed this jurisdiction of Courts of equity partly to the peculiar relation and personal character of the parties, who are proper objects of it, and partly arising from a mixture of public and private trusts, of a large and interesting nature.

### (C) EQUITIES TO PROMOTE FAIR DEALINGS

The following equitable rights may be placed under this general head :

1. Conversion.
2. Election.
3. Performance, Satisfaction and Ademption.
4. Administration of assets.
5. Mistake, Misrepresentation, Fraud and Undue Influence.

<sup>4</sup> Story's Equity Jurisprudence, 3rd ed., p. 45.

<sup>5</sup> Strahan's Digest of Equity, 5th ed., p. 22.

<sup>6</sup> Story's Equity Jurisprudence, 3rd ed., p. 393.

<sup>7</sup> Story's Equity Jurisprudence, 3rd ed., p. 557.

6. Accident.

7. Set-off.

Conversion, election, performance, satisfaction and ademption are purely equitable doctrines. They came within the exclusive jurisdiction of equity and are, therefore, enforceable only by equitable remedies. 'Administration of assets' fell within the concurrent jurisdiction of equity which was, however, not confined to remedies but also extended to substantive rights. Mistake, misrepresentation, fraud, undue influence and accident were largely within the concurrent jurisdiction of equity, and, so far as they were within it, the grant of equitable remedies is controlled by the legal principles regulating the grant of corresponding legal remedies. With regard to set-off, it is, as observed by Story,<sup>8</sup> not easy to ascertain the true nature and extent of this jurisdiction.

Except for "Trust" which would be taken up separately under Part IV of the book, the equitable rights enumerated above may be taken up for consideration in the same order.

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8. Story's Equity Jurisprudence, 3rd ed., p. 601.

## PENALTIES AND FORFEITURES

Whenever a contract provided for a penalty or forfeiture, the full penalty or forfeiture was enforced by the ancient common law without the slightest regard to the amount of damages actually sustained by the obligee or promisee from the default. Equity, however, took a different view on the point and evolved the doctrine that wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act or the enjoyment of some right or benefit, equity regards the payment, performance or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory and will, therefore, relieve the obligor or promisor of the penalty or forfeiture provided the actual damages sustained by the obligee or promisee can be and are adequately compensated.

### Penalty :

Where the parties to a contract agree that, on breach thereof, a sum of money shall become payable by the party guilty of the breach to the other party, and the sum does not represent the amount of damages caused by a breach of the contract, but is a nominal and exorbitant sum arbitrarily fixed as a consequence of the breach, the sum so specified is called a penalty and the Court of equity held it to be too extravagant and unconscionable to be enforced. The equitable rule may be illustrated in reference to bonds.

If a man borrowed £ 100 and gave a bond for £ 1000, the condition of the bond being that if £ 100 together with 5% interest thereon were paid by a certain day, the bond should be void, the common law Courts held that if £ 100 and interest were not paid on the day named, the bond became absolute and indefeasible and the creditor was entitled to the whole of £ 1000. Equity, however, considered that the intent of the parties was that the bond was to be a mere security for £ 100 and interest and accordingly if the debtor, even after the day named, offered to pay the £ 100 together with interest and all expenses, equity would prevent the creditor from claiming or having £ 1000 on the ground that such a course would be unconscientious and oppressive.

Lord Bramwell, the great master of Common Law, in a speech before the London Chamber of Commerce in 1884, made a good deal of fun of this doctrine of equity. His Lordship said, "Equity was occasionally as inequitable as the law. Equity came into existence in this way. Some four or five hundred years ago, the office of the Chancellor was filled by ecclesiastics, and whether it was that their consciences were troubled, or that their officials were desirous of fees, he did not know—it might have been a combination of both these considerations—but they took into their heads to give relief against the hardships of the law. Thus, a man entered into a bond by which he bound himself to pay £ 100, but the condition was that if he paid £ 50 on a certain day that should be enough, and he would not have to pay £ 100. That was a bargain that if he did not pay £ 50 on a certain day, he would owe £ 100. A bargain was a bargain. But the conscience of the Chancellors was offended at this and thought it inequitable that, because a man had not paid £ 50 on a certain day, he should have to pay £ 100. Accordingly they relieved against the contract."

The equitable rule as to relief on bonds was declared by the Statutes of 1697<sup>1</sup> and 1705<sup>2</sup> which enabled the Courts of law to give the same or even wider relief. The latter Act applies only to money bonds while the former applies to "covenants or agreements in any indenture, deed or writing contained". Although equity retained its concurrent jurisdiction even after these Acts, the aid of the common law was more usually invoked. Since the fusion of law and equity under the Judicature Acts, these Acts have ceased to have the importance they formerly possessed but they still have the practical bearing in relation to procedure as affecting the form of judgment.

The equitable rule as explained above is, however, not confined merely to bonds where money is to be paid, but extends to variety of other cases where other things are to be done or other objects are contracted for. In these cases the question arises whether the agreed sum represents a genuine covenanted pre-estimate of damage due to the breach of the contract or is merely a penalty imposed on the defaulting party as a consequence of the breach. In the former case, the agreed sum will be regarded as liquidated damages and be wholly recoverable; in the latter case, it will be treated as a penalty, and is reducible to dimensions which truly represent the loss.

The question whether a sum stipulated is penalty or liquidated damages, is a question of construction to be decided upon the terms and inherent circumstances of each particular contract. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.<sup>3</sup> What the contract describes "liquidated damages" may be found to be and therefore treated as a penalty and a sum described as a penalty may in fact be and, therefore, treated as liquidated damages.

In *Clydebank Co. v. Don Jose*,<sup>4</sup> a contract for the building of torpedo boats provided expressly that the *penalty* for late delivery should be £ 500 for each boat. The House of Lords held that the entire sum could be recovered for each boat tardily delivered, on the ground that it was, though called a penalty, really liquidated damages, being a fair rough pre-estimate of damages which would be almost impossible to assess with meticulous accuracy. The converse of this is illustrated by *Re Newman*,<sup>5</sup> where the sum was described in the contract as liquidated damages but was held by the Court to be a penalty.

#### Forfeiture.

Where a person loses some property, right, privilege or benefit in consequence of having done or omitted to do a certain act, it is called forfeiture. The most common and important instance of forfeitures lies in case of a breach of covenant in leases. Thus where a lease contains a provision enabling the lessor to put an end to the lease if the lessee fails to pay the rent or comply with the covenant, *e. g.* to repair, then if the lessee fails to pay his rent or repair, and the lessor puts an end to the term by re entry, a forfeiture of the lease is said to take place.

In general, relief against forfeitures was governed by the same principles as those in case of penalties. There seems, however, to be a distinction

1. 8 & 9 Will. 3 C. 11, 1697.

2. 4 & 5 Anne, C. 3, 1705.

3. *Keable v. Farren*, 1829) 6 Bing. 141

4 (1905) A. C. 6.

5 (1876) 4 Ch. D. 724.



in equity, between penalties and forfeitures. In the former, relief is always given if compensation can be made; for it is deemed a mere security. In the latter, although compensation can be made, relief is not always given.

The equitable doctrine in case of forfeitures is that where the condition of forfeiture is merely a security for the non-payment of money (such as a right of re-entry upon non-payment of rent), it is to be treated as a mere security, and in the nature of a mere penalty and is accordingly relievable. But the Courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach. Thus, for example, in case of a forfeiture for the breach of a covenant, not to assign a lease without licence, or to keep leasehold premises insured, or to renew a lease within a given time, no relief could be had, for they admit of no just compensation or clear estimate of damages. The equitable relief against forfeiture can only be given if the forfeiture arises out of contract.

After the decision of Lord Eldon in *Hill v. Barclay*,<sup>6</sup> it was held that equity would not relieve, merely on the ground that it gave compensation, upon breach of any covenant in a lease except the covenant for payment of rent. The power of the Court to give relief has been greatly extended by several statutory provisions.

Side by side with equitable jurisdiction went a more limited jurisdiction at common law. The Courts of common law disliked the principle of forfeiture and in the construction of documents would adopt that interpretation which would avoid a forfeiture. It became, therefore, the practice of the Courts at law to restrain action for ejectment brought to enforce a forfeiture for non-payment of rent upon the defendant paying the rent or bringing it into Court. This remedy at law was afterwards defined more precisely by statute Sections 210-212 of the Common Law Procedure Act, 1852, re-enacting substantially the provision of Landlord and Tenant Act, 1730, which provided that even in equity (where formerly relief could be obtained at any time) no relief should be given against forfeiture for non-payment of rent unless relief was applied for within six months after judgment executed in an ejectment action and only on payment of rent and costs.

The case of relief from forfeiture of leases, other than forfeiture for non-payment of rent, is now dealt with by Section 146 of the Law of Property Act, 1925. Under that section, which applies notwithstanding any stipulation to the contrary, a right of re-entry or forfeiture under any proviso or stipulation in a lease, is not enforceable by action or otherwise until the lessor serves on the lessee, a notice (a) specifying particular breach of covenant complained of, and (b) if the breach is capable of remedy, requiring the lessee to remedy it, and (c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time to comply with notice.

In view of subsequent legislations on point, the subject, either as to the limits within which the equitable relief could be had or as to the difference between the legal and the equitable relief, does not retain any practical importance.

It may be mentioned that before the Judicature Act, Courts of equity granted relief against penalties and forfeitures in two ways :

6. (1811) 18 Ves. 56.

1. The Court restored the estate, if it had already been taken away at law, or recalled the penalty, if it had been exacted.
2. The Court restrained the prosecution of an action at law to enforce the forfeiture or to recover the penalty.

"The doctrine of relief against penalties and forfeitures is confined to provisions in contracts. It does not apply to cases of forfeiture by operation of law, *e. g.* the forfeiture of a copyholder's estate for waste. Nor does it apply to provisions, whether in contracts or in wills, which grant an indulgence upon certain terms, *e. g.* an option to purchase in a contract or will or a legacy upon a condition. In these cases the condition must be complied with, according to its letter."

### INDIAN LAW

#### Penalty.

In India, the equitable rule with regard to penalty, as explained above, is contained in Section 74 of the Indian Contract Act, 1872. The body of the section, leaving aside the explanations, runs as follows:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or *if the contract contains any other stipulation by way of penalty*, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named, *or as the case may be, the penalty stipulated for.*"<sup>a</sup>

Under this section the party complaining of the breach is entitled only to such compensation as the Court considers reasonable under the circumstances notwithstanding the sum agreed or mentioned in the contract as the amount to be paid in case of breach or any other stipulation by way of penalty. Under the section damages are given by way of compensation for the loss suffered by the plaintiff. It is not by way of punishing the defendant for the breach. Motive for the breach is not taken into consideration because generally "punitive damages are not recoverable for breach of contract."<sup>a</sup>

The right to reasonable compensation under this section is not dependent on proof of actual loss or damage. Even when no actual damage or loss is proved to have been caused by the breach, the party is entitled to reasonable compensation.

The compensation that may be awarded by the Court under this section, cannot exceed the sum named in the contract by the parties themselves. The assessment of damages cannot be based on the economic policy of the country where from goods are imported policy.<sup>b</sup>

The underlying principle of this section has been expressed by Sundara Aiyar, J., in the following words:

"The doctrine that the Court will carry out all contracts between parties, is confined to the carrying out of the primary contract, and

7. Ashburner's Principles of Equity, 2nd ed., p. 261.

8. The words in italics were added by the Indian Contract (Amendment) Act, 1899.

It was held in some cases [*e. g.* *Baij Nath v. Shah Ali*, 14 Cal 248] that the section as it originally stood, could not apply except where a certain sum was named in the contract. It was with a view to remedy this defect and in particular to cover fully all cases of stipulations for enhanced rate of interest, that this amendment was made.

8a. The American Restatement of the Law of the Contract, § 342.

8b. *Naihati Jute Mills v. Khyalram*, A. I. R. 1968 S. C. 522.

does not extend to a secondary or subsidiary contract, to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract to be binding on the promisor, if he breaks this contract, is regarded as a secondary one, intended to secure the fulfilment of the primary contract ; and the Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness."<sup>9</sup>

It need be noticed that the right to compensation for any loss or damage caused by the breach of a contract is provided for under section 73 of the Act which is declaratory<sup>11</sup> of the common law as to damages. Section 74 contains, with some modification, the equitable rule under English Law and "does not overlap or extend section 73 ; there must be something in the nature of a penalty."<sup>12</sup>

The manifest object of section 74 is to get rid of all those questions with regard to the agreed sum being a 'penalty' or only 'liquidated damages' by providing that all such sums shall be treated as penalties.<sup>12</sup> So, in the case of *Panna Singh v. Arjan Singh*,<sup>13</sup> where the agreement of sale provided that whichever party retracts from the contract, will pay Rs. 10,000 as damages, and the contract was broken, it was held by the Privy Council that the effect of the Indian Contract Act of 1872, section 74, is to disentitle the plaintiff to recover *simpliciter* the sum of Rs. 10,000 whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

The Select Committee of the Supreme Council gave the following reason for introducing this change :

"It is notoriously the practice of the Natives to introduce heavy penal stipulations into their agreements and these are intended to operate simply *in terrorem*. It may, no doubt, be said that by changing the law, the people might be led in time to a better system. But partly through the tenacity of habit in the Natives, partly through the time which it takes to diffuse acquaintance with the new rule, and partly also through the fact that, in case of bond-debts, it is the creditor who frames the instrument, there would be a great deal of positive suffering inflicted, and possibly more than the Legislature has a right to impose, before the result aimed at by the Bill could be attained."<sup>14</sup>

The main difference between the equitable rule of English Law on the point and the provisions of section 74 is that, under this section, 'unlike English Law', the Court is not concerned with the question whether the sum named in the contract is 'liquidated damage' or 'penalty'. Even if the sum specified in the contract is only the pre-estimate of damages by the parties, it is treated as 'penalty' and the Court is not bound to award it unless it finds that it would, under the circumstances, be a reasonable compensation.

9. Muthu Krishna Iyer v. Sankaralingam Pillay, (1912) 36 Mad. 229, 251.

10. Jamal v. Moola Dawood, (1916) L. R. 43 I. A. 6.

11. Pollock & Mulla : Indian Contract and Specific Relief Acts, 7th ed., p. 409, f. n. (f).

12. Report of the Select Committee on the Bill. See Faiz B. Tyabji : Indian Contract Act, 1919 ed., p. 310.

13. C. W. N. 949.

14. Taken from Faiz B. Tyabji, *supra*.

It is, however, submitted that the difference is more of form than of substance. Even though the Court, under section 74, is not bound or required to consider whether the sum named in the contract as the amount to be paid in case of a breach thereof is 'liquidated damage' or 'penalty' nor to award the same even if it be the former, yet it is natural for the Court in assessing reasonable compensation to consider the nature of damages fixed by the parties themselves and no sum could be a more reasonable compensation than that calculated and agreed upon by the parties themselves freely and at their arm's length without any element of oppression therein; and this is just what English Law means by 'liquidated damages' in contrast to 'penalty'. The duty of the Court is, for all practical purposes, more or less the same in both the systems of law. That the Courts in India are, under section 74, faced with the question whether the stipulation as to satisfaction in case of the breach of contract is penal in character and substance or not, is shown by some of the illustrations to the section itself as also by a number of decided cases.

Thus illustrations (d), (e), (f) and (g) provide either that ".....this is a stipulation by way of penalty and (B) is only entitled to reasonable compensation" or that ".....the stipulation is not by way of penalty and the contract may be enforced according to its terms".

Similarly, for example, the Madras High Court in holding<sup>15</sup> that the stipulation that on non-payment of an instalment of the debt due, the whole amount is to become payable, does not constitute a penalty under section 74 and it followed the English case of *Wallingford v. Mutual Society*.<sup>16</sup>

It may also be noticed that the Court may find the penalty itself named in the contract to be a reasonable compensation and award the same under this section.<sup>17</sup>

The proposition is also established by the pronouncement of the Privy Council<sup>18</sup> that an agreed liquidated damages, if it be enforced, must be the result of a 'genuine pre-estimate of damages'. They do not include a sum fixed *in terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum and which obviously have at no time been estimated by the contracting parties.

The section has carved an exception in case of bail-bond or recognizance etc., for the performance of any public duty and the person bound is, upon a breach of the condition, liable to pay the whole sum mentioned. Thus, if A gives a recognizance binding him in a penalty of Rs. 500/- to appear in court on a certain day, he is liable, in case of default, to pay the whole penalty.

It was held by the High Court of Patna in *Jitendra Nath v. Mt. Jasoda*<sup>19</sup> that the doctrine of penalties is inapplicable to stipulations in decrees whether passed on compromise or contest. It has, on the other hand, been held by a Full Bench of the High Court of Allahabad<sup>20</sup> that a com-

15. *Tatayya v. Gangayya*, A. I. R. 1927 Mad. 965.

16. (1880) 5 Q. B. D. 592.

17. *Abbakke Heggadthi v. Kinhiamma Shetty*, (1906) 29 Mad. 491; *Sunder v. Sham Krishen*, (1906) 34 Cal. 150 (P. C.).

18. *Michel Habib v. Sheikh Suleiman*, A. I. R. 1941 P. C. 101.

19. A. I. R. 1926 Pat. 122.

20. *Mohiuddin v. Kasmiro Bibi*, (1933) 55 All. 334.

promise is an agreement notwithstanding the fact that it is embodied in a decree and is, as such, subject to the equitable rule under section 74. It is open to the Court executing such a decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. The same view is held by other High Courts also.<sup>21</sup>

The rule is now well settled that where the amount is named in a contract to be paid on breach of contract, the party suffering from breach is entitled to receive reasonable compensation regardless whether it is penalty or not. The amount named determines the maximum limit of liability which the Court can fix. It is immaterial whether or not the party has proved to have suffered actual loss.<sup>21a</sup>

#### Forfeiture.—

The ancient common law rule with regard to forfeitures is incorporated under section 111 (g) of the Transfer of Property Act, 1882, and the equitable rule against forfeitures has been laid down in sections 114 and 114-A of the same Act.

Under section 111, forfeiture is incurred by (i) the breach of an express condition entitling the lessor to re-enter thereon ; (ii) denial of the lessor's title ; (iii) the insolvency of the lessee if so provided in the lease ; provided that the lessor, in either case, gives notice in writing to the lessee of his intention to determine the lease.

Recently the Patna High Court pointed out two things for attracting sub-section (g) of section 111. First, there should be an express condition in the lease for payment of rent. Secondly, there should be a clause to re-enter in the lease in the case of default of payment of rent.<sup>21b</sup>

Section 114 of the Act contains the equitable rule of English Law, stated above, giving relief against forfeiture for non-payment of rent. The principle is the same. The notable distinction between the existing law on the point under the English and the Indian Law is that under English Law<sup>22</sup> the lessee may apply for relief not only at the hearing of the suit for ejectment on forfeiture but within six months after the decree for ejectment, while under this section the lessee must apply at the hearing of the suit for ejectment.

The relief provided for under this section is discretionary and the courts would decline to grant the relief if, under the circumstances, it is unjust and inequitable.<sup>23</sup>

In *Parduman Kumar v. Virendra Goyal*,<sup>23a</sup> the Supreme Court referring with approval to the rulings in this behalf of the High Court held that there was no law to the exercise of this jurisdiction by the Appellate Court merely because in the Court of first instance relief against forfeiture was claimed by the tenants and they failed to avail themselves of the opportunity of paying the amount of rent with the interest thereon and cost of the suit although it is no doubt open to the Appellate Court, having regard to the conduct of

21. *Sulbaya v. Pedayya*, A. I. R. 1937 Mad. 234 ; see also *Hira Lal v. Durga Bai*, A. I. R. 1937 Nag. 413.

21a. See *Chunilal v. Mehta & Sons v. Century Spinning and Mfg. Co. Ltd.*, A. I. R. 1962 S. C. 1314.

21b. *Hari Pd. Tamoli v. Smt. Indira Devi*, A. I. R. 1977 Pat. 208.

22. See p. 106, supra.

23. *Namdeo Lokman Lodhi v. Narmadabai*, A. I. R. 1953 S. C. 228 ; *Luxmi Spinning and Weaving Mills Ltd. v. Ibrahim*, A. I. R. 1958 Cal. 428.

23a. A. I. R. 1969 S. C. 1349.

the tenant, to decline the exercise of its discretion to grant him relief against forfeiture. "The question 'it was added' is not one of jurisdiction but of discretion".

In this respect the maxim 'he who seeks equity must do equity and must come with clean hands' applies and, accordingly, if the conduct of the tenant is such that it disentitles him to relief in equity. The court is not bound to give him any relief.<sup>23b</sup>

The appellate Court can also exercise its discretion to grant equitable relief against forfeiture by requiring the sub-lessees to pay the arrears.<sup>23c</sup>

Section 114-A was inserted by the Amending Act XX of 1929. Prior to the enactment of this section, the only case in which relief against forfeiture was available, was in respect of non-payment of rent under section 114 and it was held that the Court could not give relief where the forfeiture took place by reason of a breach of condition in the lease, *e. g.* breach of covenant to repair.<sup>24</sup> The amendment was accordingly made which incorporates the English Law for relief against forfeiture. The principle as also the scope of this section would be clear from the following report of the Select Committee on this section :

"As the Transfer of Property Act stands, the only case in which relief against forfeiture is provided for is for the non-payment of rent in section 114 of the Act. Considerable hardship has been caused in cases where forfeiture accrues on breach of an express condition which provides that on breach thereof the lessor may re-enter *although the breach may be capable of easy remedy*. This defect does not exist in the English Law where there was provision made by the Conveyancing Act, 1881, for forfeiture in such cases. These provisions of the Conveyancing Act are reproduced in English Law of Property Act, 1925, section 146. We think it desirable that similar provisions, suitable to Indian conditions, should be introduced in the Transfer of Property Act and we have, accordingly, added section 114-A."

The provisions of section 114-A are almost identical with those of section 146<sup>25</sup> of the Law of Property Act, 1925, except that section 114 A adds that "Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

The section, in so far as it goes, is a modification of section 111 (g) clause (i). It does not apply to forfeiture for disclaimer. There is no power to relieve against forfeiture for disclaimer.<sup>26</sup>

As observed earlier in reference to English Law, cases of penalties and forfeitures must be distinguished from those of concession or privilege stipulated for or available through the agreement and if, from the surrounding circumstances and the language of the instrument it appears to be the latter, no relief is obtainable for the loss of the same by the non-fulfilment of the requisite condition.<sup>27</sup>

23b. *Namdeo v. Narmadabai*, (1953) S. C. R. 1009.

23c. *Govinda Lal v. Janak Nath*, A. I. R. 1977 Cal. 178.

24. *Dabendra v. Cohen*, (1927) 54 Cal. 485.

25. See p. 106. *supra*.

26. *Kemalooti v. Muhamed*, (1918) 41 Mad. 629.

27. *Shanmugam Pillai v. Annalakshmi*, A. I. R. 1950 F. C. 38.

So, where there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, a payment by instalments, by particular date or dates, then the party seeking to take advantage of that condition, must carry out strictly the conditions on which it was granted and there is no power in a Court of equity to relieve him from the obligation or consequences of doing or failing to do so. Thus, where X covenanted to pay Rs. 27,000/-, within fifteen days in which case Y would give up the balance of Rs. 36,000/- the amount due, failing which the latter sum would remain payable and X failed to pay within the stipulated time, it was held that there was no equity in favour of X and that he was, therefore, bound by the agreement and must pay the larger sum.<sup>28</sup>

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28. *Burjorji v. Madhavilal*, A. I. R. 1934 Bom. 370.

## CHAPTER VIII

### MORTGAGES AND LIENS

**Definition and nature of mortgages.**—If A seeks to borrow money from B, B may advance the loan simply on A's promise or obligation to repay it or he may require some additional guarantee or security for the repayment of the loan. One of the ways through which the realization or recovery of the loan may be made more secure, is by the debtor conveying to the creditor some property with a promise that on repayment of the loan, the conveyance shall become void or the property shall be reconveyed. This is called a mortgage and is one of the most important and prevalent securities against loans and debts.

The word 'mortgage' is a compound of the Norman-French, *mort*, dead and *gage*, a pledge, and originally, it denoted a pledge of land under which the creditor took the rents and profits for himself, so that it was dead or profitless to the debtor as opposed to a pledge under which the rents and profits went in reduction of the debt.

A mortgage may be defined as a conveyance of property whereby one person (who is called the mortgagor) secures to another (who is called the mortgagee) the payment of money, whether already owing, or advanced at the time, or to be advanced subsequently (which is called the mortgage debt), by vesting in him some property or interest in property, subject to the mortgagor's right to redeem or buy it back by paying the money within a certain time, while the mortgagee has the right after the lapse of the same time, of enforcing his security or making it available in obtaining the payment of money due.

The term 'mortgage' is most commonly used as applied to land or other reality and leaseholds but personally, *i. e.* all sorts of movable property may also be mortgaged.

Where the legal estate is conveyed, the transaction is known as a legal mortgage; the term, 'equitable mortgage' being used to denote a conveyance of equitable estate. In general, the equitable mortgagee has the same rights as a legal mortgagee, subject only to such differences arise from his not possessing the legal estate.

It has been stated already<sup>1</sup> how the common law Courts in England strictly construed and gave effect to the terms of a mortgage and enabled the mortgagee to become absolute owner of the mortgaged property after the stipulated period for redemption expired and how and on what principles, the Courts of Equity intervened or interfered in respect of such mortgages and instead of allowing the mortgagee to become the absolute owner, allowed the mortgagor to redeem the mortgaged property even after the expiry of the stipulated period for redemption.

In the beginning, the Chancellors interfered only when the default of the mortgagor was due to accident or where there were special equitable grounds for relief. In course of time, however, the Court of Chancery assumed a general jurisdiction to relieve against forfeiture by reason of the non-payment of the debt on the appointed day. The action of the Court of Chancery was

1. See pp. 77-78, *supra*.



strenuously resisted by the common law judges of the time but after a keen and protracted struggle, the Chancellors won the day. It is not certain when the Courts of equity for the first time commenced giving relief to the mortgagor ; but the right of the mortgagor to be restored to his property on payment of the principal, interest and costs, seems to have been fully recognized in the reign of Charles I. In course of time, mortgages fell almost entirely within the jurisdiction of the Court of Chancery and by Section 34, sub-section 3 of the Judicature Act, 1873, the redemption and foreclosure of mortgages were exclusively assigned to the Chancery Division of the High Court of Justice.

In India, the whole law on mortgages is now contained in the Transfer of Property Act (IV) of 1882<sup>2</sup> and an elaborate treatment of the subject may not be suitably included in this book and should be left over for a treatise on that Act itself. It may, however, be necessary and useful to make here a general survey of mortgages in reference to some of its chief characteristics and incidents.

Mortgages were well known in Hindu and Mohammedan law and underwent a similar process of evolution as in Roman law. "The Hindu law of securities," it was observed by Sir Rashbehary Ghose, "...deserves very careful study, and I trust I shall not be accused of an idle pride in my own national system, if I venture to affirm that although not quite so perfect as the Roman law, it is still, on the whole, a model of good sense and logical consistency."<sup>3</sup>

The Mohammedan law of securities has similarly its own history and distinctive marks. During its progress in India, however, it has lost all its distinctive features, and there can be no better proof of it than the fact that, according to the law, as administered at any rate in Bengal and the North-Western Provinces, even before the Transfer of Property Act, the respective right of mortgagor and mortgagee were the same whether the parties were Hindus or Mohammedans. The process which Mohammedan law underwent in India may be described as one of gradual assimilation with the Hindu law.<sup>4</sup> On the eve of the British rule and administration of justice in this country, the Hindu and Mohammedan law of securities had been welded together and the result was a mixed system which has been brought into the shape in which we find it in the Transfer of Property Act by the infusion of some of the doctrines of the Court of Chancery in England.

Section 53 (a) of the Transfer of Property Act defines mortgage as follows :

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

Commenting on this definition J. Mahmood, observed : "Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in section 58...That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decision of the Indian Courts of Justice."<sup>5</sup>

2. Ss. 58-104 inclusive of charges.

3. Law of Mortgages in India, 5th ed., pp. 54, 55.

4. Ghose on Mortgages in India, 5th ed., p. 56.

5. Gopal v. Parsotam, (1885) 5 All. 121, 137.

It may be noted that whatever may be the form of the mortgage, it operates as a transfer of an interest in land which is given as security. But the interest which, in equity, passes to the mortgagee is not ownership or dominion which, notwithstanding the mortgage, resides in the mortgagor. The right of the mortgagee is only an accessory right which is intended merely to secure the due payment of the debt.

Though a mortgage and pledge are both securities for the money due, the two are distinguishable as follows :

- (i) a pledge is restricted to goods or personal chattels while all sorts of properties may be the subject of a mortgage although generally it is in respect of realty or immovable property ;
- (ii) the ownership in the mortgaged property is, for the time being or subject to equities, transferred to the mortgagee while the ownership, in case of a pledge, is retained or continues to reside in the pledgor ;
- (iii) transfer of possession being essential in case of a pledge, only such properties can be pledged which are capable of transfer of possession.

### CLASSIFICATION OF MORTGAGES

The Transfer of Property Act divides mortgages into six groups :

1. Simple mortgage.
2. Mortgage by conditional sale.
3. Usufructuary mortgage.
4. English mortgage.
5. Equitable mortgage.
6. Anomalous mortgage.

#### Simple mortgage.

“Where without delivering the possession of the mortgaged property, the mortgagor binds him personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage.”<sup>6</sup>

A simple mortgage corresponds to the hypothecation of the Roman law. Here the mortgagee is not put into possession of the property pledged to him. He has not, therefore, the right to satisfy the debt out of the rents and profits, nor can he acquire the absolute ownership of mortgaged property by foreclosure. The mortgagee has, generally speaking, on the default of the debtor, a two-fold cause of action : one arising out of the breach of the covenant to repay and the other arising out of the hypothecation. The personal liability created by a simple mortgage being separable from the obligation *in rem* created by the pledge, the mortgagee may sue the debtor personally, although he may not be able to enforce his security as, for instance, in a case in which, owing to want of registration, no mortgage has been effectually created.

The definition of a mortgage in the Transfer of Property Act is wide enough to embrace many transactions which would be treated only as charges

6. Section 58 (b), Transfer of Property Act, 1882.

in England, and hence arises the difficulty of drawing a sharp line of distinction between a mortgage and a charge<sup>7</sup> in this country. The following distinctions may, however, be made between the two :

- (i) Whereas a charge only gives right to payment out of a particular fund or particular property without transferring any interest in that fund or property, a mortgage is, in essence, a transfer of an interest in specific immovable property.
- (ii) A charge may be created either by act of parties or by operation of law but a mortgage arises only by act of parties.
- (iii) The creation of a charge does not necessarily imply the existence of a debt while it is so in case of a mortgage.
- (iv) A mortgage is good against subsequent transferees and may be enforced against a *bona fide* purchaser for value with or without notice while a charge is good only against subsequent transferees with notice.

“While in case of a charge there is no transfer of property or any interest therein but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money *in praesenti*.”

## 2. Mortgage by conditional sale.

“When the mortgagee ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute ; or

on condition that on such payment being made, the sale shall become void ; or

on condition that on such payment being made, the buyer shall transfer the property to the seller—

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.”<sup>8</sup>

This is a mortgage in which the ostensible sale is conditional and intended simply as a security for the debt. It need be noticed that the definition does not mention a personal covenant to repay and the personal liability is, therefore, not an essential ingredient of a mortgage by conditional sale. The mortgagee's right of recovery of the mortgage money is thus limited to the mortgaged property. This marks the essential difference between a mortgage by conditional sale and a simple mortgage.

A mortgage by conditional sale must be distinguished from a sale with a condition or clause for re-purchase :

- (i) In a mortgage, the debt subsists and the right to redeem remains with the debtor, but a sale with a condition of re-purchase is not a lending and borrowing arrangement ; no debt subsists and there

7. See Sec. 100, Transfer of Property Act, 1882.

7a. *J. K. Pvt. Ltd v. New Kaiser-i-Hind Spg. & Weaving Co. Ltd*, A. I. R. 1970 S. C. 1041.

8. Section 58 (c), Transfer of Property Act, 1882.

is no right to redeem, but simply a personal right of re-purchase is reserved for the seller.

- (ii) In a sale with a condition for re-purchase, the power must be exercised strictly in accordance with the terms of the condition ; while in the case of a mortgage, a failure to fulfil the strict terms of the agreement is not immediately followed by a forfeiture of the property. The reason of this distinction is that in the case of a sale with an option to the vendor to re-purchase within a given time, there is no equity whatever to relieve against the sale so as to deprive the purchaser of his property ; but in the case of a mortgage, the transaction is regarded only as a security, and the mortgagee is therefore sufficiently compensated if he is allowed interest in default of payment at the appointed time.

To decide whether a transaction is a mortgage by conditional sale or an outright sale, its true nature has to be determined by the intention of the parties thereto as evidenced by the terms of the document.<sup>8a</sup>

The question whether a transaction is a sale with a condition for re-purchase or a mere mortgage in the form of a sale, depends upon the intention of the parties which may be found in the deed itself or gathered from circumstances attending the transaction. The test formulated by Butler, for determining whether a conveyance is a sale or a mortgage, is as follows :

"If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him ; if he was not led into the immediate possession of the estate ; if instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest ; or if the expense of preparing the deed of conveyance was borne by the grantor ; each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely pignioritious."<sup>9</sup>

The above principle and distinction stand affirmed by the decision of the Supreme Court in *P. L. Bapuswami v. N. Pattay*,<sup>9a</sup> where the transaction was held to be mortgage by conditional sale and not sale with condition for repurchase on account *inter alia*, of the facts and circumstances that (i) condition for repurchase is embodied in the same document ; (ii) consideration was Rs. 4,000/- whereas the real value of the property was Rs. 8,000/- ; (iii) the *patta* remained with the transferor and was not handed over to the transferee ; (iv) the *kist* of the land continued to be paid by the transferor ; and (v) the consideration for reconveyance was Rs. 4,000/-, *i. e.* the same as that of conveyance. The form of the deed of conveyance in this case was ostensibly one of sale and it was observed, "The form in which the deed is clothed is not.....The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of the surrounding circumstances. If the language is plain and unambiguous it must be in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts".

8a. (1973) Andh L. J. 361.

9. Mortgages in India by R. Ghose, 5th ed., p. 91.

9a. A. I. R. 1966 S. C. 902, 903.

### 3. Usufructuary mortgage.

"When the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, or any part of such rents and profits and to appropriate the same in lieu of interest or in the payment of mortgage money or partly in lieu of interest and partly in the payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee a usufructuary mortgagee."<sup>10</sup>

A usufructuary mortgage is a very common form of the security in this country. Its chief characteristics are :

- (a) the mortgagee takes possession of the mortgaged property on the understanding that he will pay himself out of the rents and profits ;
- (b) no time limit is fixed for the mortgage money becoming due or being paid ;
- (c) the mortgagee cannot sue either for sale or for foreclosure ;
- (d) there is no personal liability on the mortgagor.

The mortgagee is under a strict liability to account for the rents and profits not only those actually received or made, including the occupation rent, but such as might or ought to have been received or made by him. Thus in *White v. City of London Brewery Co.*,<sup>10a</sup> where the mortgagee, a brewer, let the public house mortgaged to him as a tied house (e.g. subject to a covenant to take only the mortgagee's own beers), it was held that he would be liable not only for the rent actually received but for the higher rent he would have received had he let it as a free house (*i. e.* without restriction as to the purchase of his beer). The mortgagee is, on the other hand, entitled to reimbursement of the legitimate costs to management incurred by him.

Under section 58 (d) no time is fixed for repayment, since the mortgagee is entitled to remain possession, until the payment of the mortgage-money, and none can say with any precision when such payments will be completely made. If the parties stipulate that the mortgage is for a definite period it is no longer a usufructuary mortgage but becomes an anomalous one.<sup>10b</sup>

### 4. English mortgage.

"Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."<sup>11</sup>

From the definition it is clear that an English mortgage under the Transfer of Property Act must contain a covenant to pay. But such covenant is not an essential part of a mortgage in England.

The three essentials of an English mortgage are : (i) that the mortgagor should bind himself to pay the mortgage-money on a certain day ; (ii) that the property mortgaged should be transferred absolutely to the mortgagee ; (iii) that such absolute transfer should be made subject to a proviso that the mort-

10. Section 58 (d), Transfer of Property Act, 1882.

10a. (1889) 42 Ch. D. 237.

10b. A. I. R. 1968 S. C. 1182.

11. Section 58 (e), Transfer of Property Act, 1882.

gagee will reconvey the property to the mortgagor upon payment by him of the mortgage-money, on the appointed day.

An English mortgage resembles a mortgage by conditional sale in so far as both of them belong to that class of securities in which the ownership of the property pledged is liable to be transferred from the debtor to the creditor on default of payment. There are, however, important distinctions between the two forms of mortgage :

- (a) In an English mortgage, the mortgagor ordinarily enters into a covenant for the payment of the debt, and even if there is no such covenant, a debt may be created by implication. The debtor is, therefore, personally liable for the debt notwithstanding the conveyance. But in a mortgage by conditional sale in this country, the mortgagor does not necessarily make himself personally liable for the payment of the mortgage-money and the mortgagee has his remedy against the mortgaged property alone.
- (b) In an English mortgage, the ownership in the mortgaged property is wholly transferred to the creditor, which is, however, liable to be divested by the repayment of the loan on the appointed day. In the mortgage by conditional sale, on the other hand, the creditor acquires only a qualified ownership, which, however, by the terms of the agreement, generally ripens into absolute proprietorship to the default of the mortgagor.

#### 5. Mortgage by deposit of title deeds.

"Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other towns which the State Government concerned may, by notification in the official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds."<sup>12</sup>

"It is not necessary in this mortgage that the debtor himself must in person produce the document and deposit the same in any of the towns mentioned in that section. If the intention was to deposit the documents in the town mentioned in that section and the documents were forwarded either through the agent of the debtor or through the agent of the creditor the ultimate deposit shall be deemed to have been made only in the town notified in that section and not in the place where the documents in fact were received for the purpose of the deposit in the notified town."<sup>12a.</sup>

In England a mortgage of this kind is called an equitable mortgage because, following a well-known maxim, equity regards the transaction in the same light as a formal mortgage ; and this sort of mortgage being recognized in equity is called an "equitable mortgage" as opposed to a "legal or common law mortgage".

The creation of a mortgage by a mere deposit of title deeds is peculiar to the English system. It is unknown in Scotland, as well as in the Continental Europe and even in America, the jurisprudence of which in most of the States is based on English law, equitable mortgages are recognized only to a very limited extent. In England, too, they were not originally admitted without much protest.

12. Section 58 (f), Transfer of Property Act, 1882.

12a. *Sulochana & others v. The Pandyan Bank Ltd.*, A. I. R. 1975 Mad. 70.

In India, equitable mortgages have been recognized without question since the decision of their Lordships of the Privy Council in *Varden Seth Sam v. Luckputty*.<sup>13</sup> The term 'equitable mortgage' being considered inappropriate in India on account of the absence of an express classification or division of estates or rights into legal and equitable, these are called mortgage by deposit of title deeds. The Transfer of Property Act, however, restricts their operation to certain centres of commerce. This has been done as a matter of convenience to the mercantile community to enable them to borrow money without the delay of investigation of title and the publicity of registration. Such mortgages are, however, at variance with the policy of publicity or transfer underlying this Act and the Registration Act.

The requisites of a mortgage by deposit of title deeds are : (1) a debt ; (2) a deposit of title deeds ; (3) an intention that the deeds shall be security for the debt. This mortgage does not require any writing and being an oral transaction is not affected by the law of Registration. But it is usual for the deposit to be accompanied by a memorandum in writing. The intention that the title deeds shall be the security for the debt is the essence of the transaction. If it is in the contemplation of the parties to have a legal mortgage prepared and if the title deeds are deposited for that purpose only, the deposit does not create a mortgage. The equitable mortgage created by deposit of title deeds is extinguished by merger when the legal mortgage is created.

Section 96 of the Transfer of Property Act places mortgages by deposit of title deeds on the same footing as simple mortgages. It runs thus : "The provisions hereinbefore contained which apply to a simple mortgage shall, as far as may be, apply to a mortgage by deposit of title deeds."

#### 6. Anomalous mortgage.

"A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section<sup>14</sup> is called an anomalous mortgage."<sup>15</sup>

The classification of mortgages contained in Section 58 of the Transfer of Property Act, reproduced heretofore under various heads is not exhaustive. It only describes the most common forms of mortgages in India. But mortgages may be created in a variety of ways and a study of the Indian Law Reports will show that in India, where almost every mortgage does what is right in his eyes, mortgages are almost endless in form. But the important point to be remembered is that whenever any specific property is made answerable for the repayment of a debt or the performance of any other engagement which may give rise to a pecuniary liability, a mortgage is created in favour of the obligee which, unless it falls under one or other of the five classes mentioned above, must be treated as an anomalous mortgage.

The largest contribution to the class of anomalous securities is furnished by the various kinds of local mortgages possessing well-known incidents derived from custom. The most familiar instances are the *Otti* and *Kanom* of Malabar ; *Illudwara* also is common in some parts of Madras. They are all in the nature of usufructuary mortgages partaking to a certain extent of the character of leases.

The rights and liabilities of the parties, in the case of an anomalous

13. (1862) 9 M. I. A. 307

14. Section 58 covering the definitions of other mortgages given above.

15. Section 58 (g), Transfer of Property Act, 1882.

mortgage are determined by their contract as evidence in the mortgage-deed, and so far as such contract does not extend, by local usage.<sup>16</sup>

### RIGHTS AND LIABILITIES OF THE MORTGAGOR AND MORTGAGEE

Instead of discussing the topic at length, it may, for the purposes of this book, suffice to consider some of the most important characteristics and incidents of a mortgage on this topic under the following heads :

- (1) Mortgagor's right to redeem.
- (2) Mortgagee's right to foreclosure.
- (3) Tacking of mortgages.
- (4) Consolidation of mortgages.
- (5) Marshalling securities.
- (6) Contribution to mortgage debts.
- (7) Subrogation.

### REDEMPTION

#### Equity or right of redemption :

The most important right possessed by the mortgagor is the right to redeem the mortgage, *i. e.* the right to get back the mortgaged property free from any obligation or encumbrance on his repaying the mortgage debt including interest due before it is foreclosed or the estate is sold at the instance of the mortgagee.

In the jurisprudence of the *Praetors* at Rome, it had been established that where property was pledged for a debt, the debtor might redeem the estate on payment of the debt at any time before the passing of a judicial sentence confirming the creditor in his estate. But the Common Law Courts in England, as stated already, rigidly construed and enforced the condition with regard to the time and manner of payment of the mortgage money and in case of default by the mortgagor, the mortgagee's estate became absolute and the legal right of redemption was lost for ever.

"Courts of equity, therefore, acting upon their general principles, could not fail to perceive the necessity of interposing to prevent such manifest mischief and injustice which were wholly irremediable at law. They soon arrived at the just conclusion, that mortgages ought to be treated, as the Roman Law had treated them, as a mere security for the debt due to the mortgagee ; that the mortgagee held the estate, although forfeited at law, as a trust and that the mortgagor had what was significantly called an equity of redemption which he might enforce against the mortgagee, as he could any other trust, if he applied within a reasonable time to redeem, and offered a full payment of the debt and of all equitable charges."<sup>17</sup>

The sum total of the mortgagor's rights and interests in the mortgaged property is called the equity of redemption. This was initially regarded as a mere right but, in course of time, it was recognized or treated as an equitable estate in land.<sup>18</sup> It has, subject only to the mortgagee's rights, all the incidents

16. Section 98 of the Transfer of Property Act, 1882.

17. Story's Equity Jurisprudence, 3rd ed., pp. 663-664.

18. *Castorne v. Scarfe*, (1737) 1 Atk. 602. Since the Law of Property Act, 1925, the mortgagor of a legal estate has a legal estate. The term 'equity of redemption' is, however, still frequently used to include the mortgagor's legal estate,



of ownership and is heritable, transferable or alienable like any other property. Equity of redemption and the equitable right to redeem are apt to be confused with or for each other. There is, however, a vital distinction between the two :

- (i) Equity of redemption comes into existence as soon as the mortgage is created but the equitable right to redeem arose only after the expiry of the period for redemption available at law.
- (ii) Equitable right to redeem is simply one of the incidents or elements of the equity of redemption and is included in or covered by the same.

A suit of redemption is a suit for enforcement of a right to redeem. It includes three reliefs which the mortgagor is entitled under the section on payment or tender at a proper time and place of the mortgage money. Thus, if all or any of the reliefs enumerated under clauses (a), (b) and (c) of this section is claimed in a suit, the suit can be taken as a suit for redemption.<sup>18a</sup>

Prior to the passing of the Transfer of Property Act, there was a long and keen controversy on the question whether in the absence of any well-known rule of law or statute, judges in India could graft upon the mutual contract of the parties the equitable rules of redemption which had been established by the Court of Chancery in England. Their Lordships of the Privy Council<sup>19</sup> seem to have thought that the doctrine that the time stipulated in the mortgage deed is not of the essence of the contract, was unknown to the ancient law of India and could not be introduced by judges as a rule of equity and good conscience. Westropp, C. J. of the Bombay High Court, on the other hand, expressed<sup>20</sup> the view that the doctrine known by the name of equity of redemption was part of the ancient common law of the country and not a forbidden importation by Anglo-Indian judges from the practice of the English Court of Chancery. The controversy was, however, set at rest by the Transfer of Property Act and section 60 of the Act recognizes and provides for the right of the mortgagor to redeem "at any time after the principal money has become due..." subject of course to the law of limitation. The right conferred by this section is called "a right to redeem" and a suit to enforce it is called a suit for redemption.

#### Clog on redemption :

So inseparable, indeed, is the equity of redemption from a mortgage that it cannot be disannexed even by an express agreement of the parties. As observed by Lord Macnaghten in *Brodley v. Carritt*,<sup>21</sup> "Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." The restriction, for instance, that money for redeeming the mortgage can be raised otherwise than by sale or mortgage of the mortgaged property, is bad and unenforceable. Any such device or contrivance is called a clog on the right to redeem.

The rule on the point has been very clearly laid down by Lord Davey in *Noakes v. Rice*<sup>22</sup> in the following words :

"There are three doctrines of the Courts of equity in this country—  
The first is expressed in the maxim 'once a mortgage, always a mort-

18a. *Manick Chand v. Saleh Mohamed*, A. I. R. 1969 S. C. 751.

19. *Pattabheramier v. Venkata Row*, (1870) 13 M. I. A. 560 ; *Thumbuswamy v. Hossain*, (1875) 2 I. A. 241.

20. *Bapuji v. Senavaraji*, (1877) 2 Bom. 231.

21. (1903) A. C. 253, 261, See also *Sarbdawan Singh v. Bijai Singh*, (1914) 12 A. L. J. R. 570.

22. (1902) A. C. 24.

gage'. The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract ; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void. The third doctrine to which I have referred is only a corollary from the first, and might be expressed in this form 'once a mortgage, always a mortgage and nothing but a mortgage'. The meaning is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs from getting back his mortgaged property in the condition in which he parted with it."

In India, the mortgagor has under section 60 of the Transfer of Property Act, a statutory right of redemption and it cannot be fettered by any condition which impedes or fetters redemption. Any such condition is void as a clog on redemption. As was observed by their Lordships of the Privy Council in *Md. Sher Khan v. Raja Seth Swami Dayal*,<sup>23</sup> "The section (Sec. 60) is unqualified in its terms and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect". In places where the Transfer of Property Act is not in force, the rule against any clog on the right of redemption would be applicable as a rule of justice, equity and good conscience.<sup>24</sup>

Where in a mortgage by conditional sale the mortgagor was given four years time from the date of execution of the mortgage deed to repay the sum but clause 9 of the conditions of the mortgage provided the right of redemption even before the period within which the mortgagor was entitled to pay off the mortgage debt had run out, the Court held that the condition in clause 9 was a clog on the equity of redemption.<sup>24a</sup>

• The question whether a particular stipulation amounts to a clog on the equity of redemption or not, rests on its nature and import and can best be answered in relation to the facts of each case. The following points may, however, be noted in this connection :

In order to amount to a clog the device or contrivance in question must form part of the mortgage agreement or be contemporaneous with the same.<sup>25</sup> The prohibition does not apply to agreements subsequent to or independently of the mortgage. The underlying principle is this : The ground on which a Court of equity held any stipulation giving the mortgagee a greater right than the right to have his debt repaid to be invalid, was based on the view that the mortgagor and mortgagee were not dealing on equal terms. The mortgagor was presumably in need of money, the mortgagee in possession of money. Therefore the Court interfered to protect the weaker party. Once, however, the mortgage is made, the mortgagor has got the money he wants. If he chooses subsequently by a new agreement to release or fetter his right of redemption in favour of the mortgagee, there arises no ground of relief from such agreement. It was, accordingly, observed by Vaughan Williams, L. J., in *Reeve v. Lister*,<sup>26</sup> "the mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in

23. (1921) 20 A. L. J. 476, 480.

24. *Mehrb n Khan v. Makhna*, (1930) 57 I. A. 168.

24a. *Gulab Chand Sharma v. Soramati Devi*, A. I. R. 1977 Pat. 242.

25. *James Fairlough v. Swan Brewery Co. Ltd.*, (1912) A. C. 565, 570,

26. (1902) A. C. 461.

*substance and in fact* is subsequent to and independent of the original bargain." Similarly in *Shanker Din v. Gokal Prasad*,<sup>27</sup> the Privy Council said that there was nothing in law to prevent the parties to a mortgage from coming to a subsequent agreement qualifying the right of redemption.

Agreements between a mortgagor and his mortgagee which do not "clog" the equity of redemption, are good. Thus, where in the mortgage of a public house there was a condition in the mortgage-deed that the mortgagor would buy the beer sold on the mortgaged premises from the mortgagee during the continuance of the mortgage, the condition was held good.<sup>28</sup> Similarly, a right of pre-emption given to the mortgagee in case the mortgagor should proceed to a sale of the mortgaged property, does not amount to a clog and is enforceable<sup>29</sup> provided the price is not fixed or is not unconscionable and the right of pre-emption does not continue after redemption.

But a stipulation for a collateral advantage is void and unenforceable if the effect is that the mortgaged property returns to the mortgagor in a worse condition than when he mortgaged it. The English law on the point is not as clear or free from controversy as it ought to be.

In *Noakes and Company Ltd. v. Rice*,<sup>30</sup> it was held that any stipulation which gives a right to the mortgagee against the mortgaged property after the mortgagor has paid off full mortgage money with interest and costs, is a clog on the equity of redemption. Here a brewer advanced money on mortgage to a publican and there was a stipulation that whether the mortgage-money was meanwhile paid or not, the publican would continue for a certain period to buy this beer for sale in the mortgaged inn from the brewer. It was held that after the mortgage debt was discharged, the publican was no longer bound by the stipulation.

This was followed in *Bradley v. Carritt*,<sup>31</sup> where the stipulation in question was not intended to bind the mortgaged property but only to impose an obligation on the mortgagor personally. Here a mortgagor mortgaged property to a mortgagee and in the mortgage agreement, it was stipulated that the mortgagor would employ the mortgagee as broker to sell the tea of the mortgagor's company during the continuance of the mortgage and after the mortgage debt was paid off, or if he did not, he would pay the mortgagee a commission on the tea sold. After the mortgage debt was paid off, the mortgagor refused so to employ the mortgagee or to pay his commission. It was held that no action lay on the covenant since the collateral advantage came to an end when the mortgage debt was paid off.

The rule, therefore, seemed to be that the collateral advantage whether it affected the mortgaged property or the mortgagor personally came to an end when the mortgage debt was discharged.

But the point came up again before the House of Lords in *Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.*<sup>32</sup> This was a mortgage by a meat preserving company to a firm of wool brokers and the mortgages stipulated for a pre-emption of sheep skins sold by the company. It was held that this right of pre-emption was enforceable notwithstanding that the loan was paid off. Lord Haldane, L. C. and Lord Parker both came to the conclusion that the option to purchase given to the mortgagee

27. (1912) 34 All. 620.

28. *Biggs v. Hoddinott*, (1889) 2 Ch. 307.

29. *Olby v. Trigg*, (1722) 9 Mod. 2.

30. (1902) A. C. 24.

31. (1903) A. C. 253.

32. (1914) A. C. 25.

was valid on the ground that it was not a term of mortgage at all. Pronouncing on the general scope of the principle, Lord Mercey observed : "The doctrine itself seems to me like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be."<sup>33</sup> This decision compared with those last considered, presents an obvious difficulty. Lord Parker treats the cases as reconcilable with a consistent principle which he states as follows :

"There is now no rule in equity which precludes a mortgagee.....from stipulating for any collateral advantage, provided such collateral advantage is not either (i) unfair and unconscionable ; or (ii) in the nature of a penalty clogging the equity of redemption ; or (iii) inconsistent with the legal or equitable right to redeem."

This, as observed by Ashburner, begs the very question at issue—what is a clog ? The present position on the point under English law may be best summarized in the following words of the distinguished writer :

"*Noakes v. Rice* is perhaps distinguishable ; a provision that turns mortgaged public house into a 'tied house' that continues 'tied' after redemption is not quite *in pari materia* with a provision giving a mortgagee the first right to purchase, at the market price, the commodity in which it is the mortgagor's business to deal. But *Bradley v. Carrit* is very much nearer. As a result it is not by any means easy to state a convincing test for the validity of such a stipulation contained in a mortgage deed. The tendency seems to be to follow *Kreglinger's* case and treat the earlier authorities, as distinguishable."<sup>34</sup>

The Madras High Court has observed that the relaxation of the rule of equity in *Kreglinger's* case does not affect the construction of a statutory enactment such as section 60 of the Transfer of Property Act.<sup>35</sup> But the tendency to restore freedom of contract between the mortgagor and the mortgagee may be observed in the judgment of the Privy Council in *Kanhaya Lal v. National Bank of India*.<sup>36</sup>

The postponement of the exercise of the mortgagor's right of redemption would not of itself constitute a clog on the equity of redemption. The validity of such a condition depends on the question whether the postponement is an unconscionable imposition on the mortgagor or is the result of the free exercise of volition by the parties, and consistently with the general attitude of equity, the mortgagor would be relieved of the condition in the former but not in the latter class of cases. The test for the validity of the postponement is whether, it is, in its nature and scope, so extravagant or oppressive as to render the right of redemption illusory or nugatory.<sup>37</sup>

Thus a postponement of the right of redemption for a period of forty years between two competent parties acting under expert advice, the money secured being 3,10,000 was held to be good and binding.<sup>38</sup> Similarly, the condition that there should be no redemption of agricultural land, except in a particular month of the year when the crops are not standing, is unobjectionable.<sup>39</sup> On the other hand, where a lease for twenty years was mortgaged

33. (1914) A. C. 25 at p. 46.

34. Ashburner's Principles of Equity, 2nd ed., pp. 208-209.

35. *Ambu Nair v. Kelu Nair*, (1930) 53 Mad. 805.

36. (1923) I. A. 162.

37. *Biggs v. Hoddinott*, (1898) 2 Ch. 307 ; *Morgan v. Jeffreys*, (1910) 1 Ch. 620.

38. *Knightsbridge Estates Trust Ltd. v. Byrne and others*, (1939) 1 Ch. 441.

39. *Kirpal Singh v. Sheoambar Singh*, 1930 A. L. J. 610.

with the condition that it could not be redeemed till within six months of the expiration of the lease, the right of redemption was illusory, the mortgage having, for all practical purposes, been made irredeemable. The stipulation was accordingly adjudged to be bad in equity and it was held that the mortgagor was entitled to redeem earlier.<sup>40</sup>

#### Exercise of the right of redemption :

Besides the mortgagor, any of the following person<sup>41</sup> may redeem, or institute a suit for redemption of the mortgaged property, namely :

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon, the property mortgaged or in or upon the right to redeem the same ;
- (b) any surety for the payment of the mortgage debt or any part thereof ;  
or
- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for the sale of the mortgaged property.

The redeeming party must pay to the mortgagee the principal of the mortgage debt—and, usually, according to the statement of it in the mortgage-deed—together with the interest thereon and the mortgagee's costs, the aggregate amount to be so paid being called "*the price of redemption*". The mortgagee, in order that he may have an adequate opportunity of finding some other security for investment of the funds released, is entitled<sup>42</sup> to a reasonable notice, depending on the nature and amount of investment, from the mortgagor before tender or payment of the mortgage-money, and, in the alternative, to interest in lieu of notice.<sup>43</sup>

Where A + B were owners each of a half above in a property and A unfructually mortgaged the entire property to X from whom B subsequently obtained an assignment of the mortgage. It was held that B was not a co-mortgagor with A and that the assignment cannot be considered as a redemption by B and did not extinguish the mortgage. It was further held that A was entitled to redeem the mortgage.<sup>43a</sup>

The mortgagor's right on redemption are :

- (i) delivery of the mortgage deed and documents of title relating to the mortgaged property which are in the possession or power of the mortgagee ;
- (ii) possession of the mortgaged-property where the mortgagee is in possession thereof ;
- (iii) reconveyance or acknowledgement to show the removal of the cloud on the title created by the mortgage—at the cost of mortgagor.

The mortgagor's right of redemption is extinguished, (a) by foreclosure ; (b) when the mortgagee has and exercises the power of sale ; (c) when it becomes barred under the Limitation Act.

40. James Fairlough v. Swan Brewery Co. Ltd., (1912) A. C. 565.

41. Section 91, Transfer of Property Act, 1882.

42. Section 60 of the Transfer of Property Act, simply recognizes the validity of such a provision in the mortgage-deed where the time fixed for the payment of the principal money has expired or no such time is fixed. The proposition is, however, maintainable on general principles and is adoptable as such.

43. Smith v. Smith, [1891] 3 Ch. 551.

43a. O. M. Jalali v. Anusuddin, A.I. R. 1974 Mad. 340.

## FORECLOSURE

Courts of equity, while securing the benefit of redemption to the mortgagor, allowed the mortgagee, on the other hand, to foreclose his mortgage in default of payment. At any time after the estate had been forfeited at law, the mortgagee could call upon the mortgagor either to redeem or in default, to be ever foreclosed from redeeming.

The order of foreclosure is an order whereby the mortgagor forfeits his legal right to get the land redeemed. "This right so foreclose is simply then the right to ask the court to withdraw its relief against a forfeiture which is created by the mortgage."

In foreclosure proceedings the Court, it has been aptly remarked,<sup>44</sup> is asked to set limits to its own benignity and, to decree that a mortgagor who is already too late to redeem at law, shall be deprived even of his equitable right. The nature of the right to foreclosure together with some of its important attributes or requirements may be very clearly and precisely expressed in the following words of Mr. Megarry : <sup>45</sup>

"Foreclosure was the name given to the process whereby the mortgagor's equitable right to redeem was extinguished and the mortgagee left owner of the property both at law and in equity. Equity had interfered to prevent the conveyance of the legal fee simple from having its full effect and on foreclosure, the Court only removes the stop it has itself put on. The mortgagee was from the first absolute owner at law, and foreclosure, for which an order of the Court is essential, makes him an absolute owner in equity as well.

"The right to foreclose does not arise until the legal right to redeem has ceased to exist *i. e.* until the legal date of redemption has passed.

"If no redemption date is fixed or if the loan is repayable on demand, the right to foreclose arises when a demand for repayment has been made and a reasonable time thereafter has elapsed.

"An action for foreclosure can be brought by any mortgagee of property whether he is the original mortgagee or an assignee and whether he is the first or subsequent mortgagee.

"A foreclosure action gives the mortgagor and all others interested in the equity in the equity of redemption an opportunity of redeeming the mortgage. Consequently, all persons interested in the equity of redemption must be made parties to the action."

Courts of equity in England very rarely allowed a sale of the mortgaged property. In recent years, however, ample powers have been given by statute to direct sales instead of foreclosure. But although sales take place more frequently now, foreclosure is still a common method of working out the rights of the mortgagees in England. The relevant provisions as to sale are now contained in the Law of Property Act, 1925, Section 101 of which recognizes in a mortgagee the power, when the mortgage-money has become due (*i. e.* when the contractual date for redemption is past) to sell or concur in selling the mortgaged property. This power may be varied, extended, or excluded by the mortgage-deed.

When the Bill for the Transfer of Property Act was under consideration it was proposed to do away with the foreclosure in this country altogether and

44. Snell's Principles of Equity, 24th ed., p. 366.

45. The Manual of Law of Real Property by R. E. Megarry, 1946 ed, p. 473.

to give the mortgagee only the right to realize his security by a sale of the pledge. But it was thought by the then Law Member of the Governor-General's Council that the amount of simplicity which would be thus gained would justify the amount of disturbances which would be created by such a change in the law. Section 67 of the Transfer of Property Act, accordingly, provides :

"In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited...a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property or a decree that the property be sold.

"A suit to obtain decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure."

The right of redemption is not subject to a contract to the contrary ; the reason being that the mortgagor requires protection against oppression, but the mortgagee not being in need of the same protection, may curtail his right of foreclosure or sale by contract.

The mortgagor's right of redemption and mortgagee's right of foreclosure are co-extensive. It means that when the mortgagor's right to redeem accrues, the mortgagee's right to enforce his security by foreclosure or sale also accrues. Ordinarily their rights accrue from the date fixed for payment, commonly known as the date of default.

It is necessary to enquire whether both or only one and which of the two rights, *i. e.* foreclosure and same would be available, to the mortgagee in a particular mortgage. This depends on the kind of mortgage in question and would be clearly understood in reference to the nature of the six classes of mortgages referred to and explained before. Clause (a) of the above section further provides :

"Nothing in this section shall be deemed—

"(a) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale."

This clause, it may be stated, is new and was substituted for the earlier one by the Amending Act XX of 1929. The object of the amendment, as disclosed in the report of the Special Committee, is to do away, as far as possible, with foreclosure and to confine it to mortgages by conditional sale and to anomalous mortgages if by the terms thereof he is entitled to foreclose.

It need be mentioned that Sir Rashbehari Ghose expressed himself strongly against the retention of the right to foreclosure in this country. Referring to the view stated above of the Law Member in favour of retaining the mortgagee's right to foreclose in this country, he observed :

"I, however, venture to doubt whether the slight disturbance which would have been created by such a law would have been too dear a price for the elegance and simplicity which such a measure would have given us. At any rate the gain to the community would have been sufficient compensation for any possible disturbance. The right of a mortgagee to foreclose, we should remember, naturally grew in England out of the

form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for retransfer upon the due payment of the debt, probably the rudest method, as Professor Holland points out, in which security can be given for the fulfilment of an engagement. In many of the States in America, as in Ireland, sale is regarded as the most appropriate remedy on a mortgage. The same practice is followed in countries which have adopted the Roman law as the basis of their jurisprudence."<sup>46</sup>

The amendment, therefore, appears to be based on this criticism.

The present position with regard to the mortgagee's right is as follows :

A simple mortgagee cannot foreclose because even from the terms of the agreement, the real right transferred to him is a right of sale and not ownership in mortgaged property which could become absolute by foreclosure.

A usufructuary mortgagee is a transferee of a right of possession only and he retains possession until the debt is discharged. He cannot, therefore, sue either for sale or for foreclosure.

In a mortgage by conditional sale, the mortgage works itself out into a sale or the conditional sale becomes absolute. The mortgagee is, therefore, not entitled to an order for sale but his only remedy is foreclosure.

Before the Amending Act of 1929, an English mortgagee could sue either for foreclosure or sale. But his rights has now been limited to one for sale.

In case of a mortgage by deposit of title deeds, there was no uniformity among the High Courts with regard to the mortgagee's right to foreclose or sale. Such mortgages have now<sup>47</sup> been placed on the same footing as simple mortgages and the mortgagee's right is thus limited to one for a decree for sale.

\* In an anomalous mortgage, the right of the mortgagee depends upon the terms of the deed and he may have both or only one of the two reliefs of foreclosure and sale.

**Tacking of mortgages.**—The doctrine of tacking, as it is usually called, is often discussed as if it were a doctrine applicable only to mortgages. It, however, applies to equitable interests in whatever way they arise. With regard to mortgages, the principle is applicable in two forms : (a) as against the mortgagor and his representatives ; (b) as against *mesne* or intermediate encumbrancers.

Tacking means uniting securities, given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem or otherwise to discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title.

The usual effect of tacking is, to enable a third mortgagee, who buys up a first mortgage, to squeeze out the second or *mesne* (*i. e.* intervening) mortgage and thereafter to insist upon being paid the aggregate amount of the first and third mortgage debts before the second mortgagee gets paid anything at all.

A mortgages his property to B ; then to C ; and then to D. D pays off B. Under the doctrine of tacking, D thereby acquires priority over C not only in respect of B's mortgage which he has purchased, but also in respect of his own. The third (equitable) mortgage is then said to be tacked to the first (legal) mortgage, the requisite for which is that the first mortgage should be

46. Law of Mortgages in India by R. Ghose, 5th ed., pp. 32-33.

47. By S. 96 of the Act introduced through Amending Act (XX) of 1929,



legal and the third mortgagee should have had no notice at the time he advanced money on his, *i. e.* the third mortgage.<sup>48</sup>

The doctrine of tacking rests upon two familiar maxims of equity : (1) he who seeks equity, must do equity and (2) where equities are equal, the law shall prevail and the same is clearly illustrated through its enunciation by Sir Joseph Jekyll, M. R. in *Brace v. The Duchess of Marlborough* :<sup>49</sup>

"If a third mortgagee buys in the first mortgage though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee."

In order to satisfy the condition of equal equity, it is necessary that the third mortgagee should have taken his mortgage without notice of the second mortgage and it would be immaterial if he had notice of the second mortgage when he purchased the first mortgage, *i. e.* acquired the legal estate.

"There is, certainly, great apparent hardship in the application of the doctrine of tacking ; for it seems most comfortable to natural justice that each mortgagee should, in such a case, be paid according to the order and priority of his encumbrances...The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property."<sup>50</sup>

In order to understand clearly the present position with regard to the right of tacking under English as well as the Indian law, it is necessary to split the proposition under two heads :

1. The right of the third or fourth...mortgagee, by acquiring the first mortgage and the legal estate therewith, to tack his debt to that secured by the first mortgage and squeeze out the intermediate mortgagees provided, of course, that at the time he made his advance, he had no notice of the intermediate mortgage.
2. The right of, a prior mortgagee, whether legal or equitable, where the mortgage was expressly made to cover further advances, to tack all these advances as against a subsequent mortgagee of whose debt, he had no notice.

In so far as English law is concerned, the first of these, *i. e.* tacking for the purpose of squeezing out an intermediate mortgagee, was expressly abolished by Section 94 of the Law of Property Act, 1925. But the second *i. e.* tacking of further advances has been preserved by Section 94 (1) of the Law of Property Act, 1925, which enacts :

"After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgagees (whether legal or equitable)—

- "(a) if an arrangement has been made to that effect with the subsequent mortgagees ; or
- "(b) if he had no notice of such subsequent mortgagees at the time when the further advance was made by him ; or
- "(c) whether or not he had such notice as aforesaid, where the

48. See the following case.

49. (1728) 2 P. Wms. 491.

50 Story's Equity Jurisprudence, 3rd ed., p. 264,

mortgage imposes an obligation on him to make such further advances."

This sub-section implies whether or not the prior mortgage was made expressly for securing further advances.

The doctrine of tacking for the purpose of squeezing out an intermediate mortgagee was not recognized in India,<sup>51</sup> and it was expressly prohibited by Section 80 of the Transfer of Property Act which has been re-enacted as Section 93 of the Act by the Amending Act of 1929. It provides :

"No mortgagee paying off a prior mortgage whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security...except in so far as such priority is allowed under Section 79 of this Act."

Section 79 preserves, within certain limitations the right of tacking in respect of future advances. It provides :

"If a mortgage, made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debts not exceeding the maximum, though made or allowed with notice of the subsequent mortgage."

The section is clearly explained by the following illustration : A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000/-. A, then mortgages Sultanpur to C to secure Rs. 10,000/-. C having notice of the mortgage to B & Co. and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000/-. B & Co. subsequently advanced to A sums making the balance of account against him exceed, the sum of Rs. 10,000/-. B & Co. are entitled, to the extent of Rs. 10,000/-. to priority over C.

It is important to note that the right to tack further advance is limited to those cases where the subsequent mortgagee had notice of the prior mortgage. It is clear that the right of tacking in respect of further advances covers a much wider ground in English Law, than that contemplated or provided for under the Indian law.

In need further be noticed that the prohibition against tacking enacted by Section 93 of the Transfer of Property Act, explained above, refers to the rights of successive mortgagees *inter se* and has no bearing on the question which may arise between the mortgagor and mortgagee with reference to consolidation, or tacking or adding expenses to the mortgage debt under Section 61 or Section 72 of the Act.

### Consolidation of mortgages.

The general rule in equity with regard to consolidation of mortgages was that where a mortgagor has mortgaged two or more different estates to the same mortgagee, the mortgagee had a right to insist that one security should not be redeemed alone, leaving him exposed to the risk of deficiency as to the others. The doctrine applies whether the property mortgaged is real or personal and whether the mortgages are legal or equitable. It has been applied

51. Gokul Nath v. Lall Prem Lal, I L. R. (1878) 3 Cal. 307, 309.

to mortgage and or sub-mortgage, and even to two mortgages on the same property.<sup>51a</sup>

Thus A, the owner of two farms X and Y, mortgaged X to B for Rs. 10,000/-, X being worth Rs. 15,000/-. Then A further mortgaged Y to B for Rs. 5,000/- Y being worth only Rs. 3,000/-. A could not claim to redeem X alone where the security is ample. If he sought to do so, he had also to be prepared to redeem Y which was insufficient for the money originally charged upon it. B had thus the right to insist on being paid both mortgages or neither; in other words, B had the right to consolidate the two mortgages.

A consolidation of mortgages of different properties, therefore, makes all the mortgages to stand on the same footing as if the whole of the properties were included in one mortgage.

The right to consolidate mortgages could be enforced not only against the mortgagor or his heir but equally against the trustee in bankruptcy of the mortgagor and against any other assignee of the mortgagor, provided the right of consolidation had accrued to the mortgagee before the assignment in question was made.<sup>52</sup> It applied equally to redemption and foreclosure suits, to legal and equitable mortgages and to real and personal property.

The doctrine of consolidation of mortgages is based on the maxim—"He who seeks equity, must do equity", and could not be invoked so long as the mortgagor retained his right to redeem at law. When that was lost, the mortgagor had simply the equitable right to redeem the mortgaged property. Hence the mortgagor seeking to exercise his equitable right to redeem one of several mortgages was, on his part, subject to the condition of doing equity to the mortgagee by redeeming all the mortgages.

The right to consolidate mortgages was always subject to any contract to the contrary in the mortgage instrument and the parties could, if they so liked, forbid consolidation of mortgages.

In England, the right of consolidation was reserved by Section 17 of the Conveyancing Act, 1881, re-enacted by the Law of Property Act, 1925, Section 93 of which provides that a mortgagor seeking to redeem any one mortgage shall, by virtue of the Act, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

The provision applies only if, and so far as, a contrary intention is not expressed in the mortgage deed.

In India, the analogous law against consolidation is contained in Section 61 of the Transfer of Property Act which provides: "A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, *in the absence of a contract to the contrary*, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together."

This section was substituted by the Amending Act of 1929 for the original section. The old section referred to a separate mortgage of other property. The new section covers not only different mortgages of different properties but also successive mortgages of the same property. The section now applies not only to two but any number of mortgages.

51a. *Re Salmon, Ex parte The Trustee*, (1903) 1 K.B. 147.

52. *Harter v Colman*, (1882) 19 Ch. D. 630.

**Marshalling securities.**

The doctrine of marshalling is generally stated in text-books in the words of Lord Eldon in *Aldrich v. Cooper*.<sup>53</sup> "If a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take that which, paying him will leave another fund for another creditor."

So, if a person who has two estates, mortgages both to one mortgagee, and afterwards only one estate to a second mortgagee, the Court will so "marshal" or arrange the security that both creditors are paid as far as possible and would, therefore, direct the first to take his satisfaction in the first place out of that estate which is not in mortgage to the second mortgagee, so as to leave the second estate or as much of it as is not required to complete the satisfaction of the first, for the second mortgagee.<sup>54</sup>

The underlying principle behind the doctrine of marshalling is that natural justice requires that one man should not be permitted, from wantonness, or caprice, or rashness to do an injury to another.

The doctrine of marshalling cannot be enforced where it would work any injustice to the prior creditor or to any other person who has, for valuable consideration, acquired an interest in the securities. It cannot, therefore, be insisted upon if the fund upon which the junior creditor has no claim, is of a dubious character or is one which may involve the prior creditor in litigation to realize his money. The right of marshalling must be exercised when the first mortgagee seeks to realize his security.

The relevant section on the point in the Transfer of Property Act is Section 81 which provides :

"If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, *in the absence of a contract to the contrary*, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagees or of any other person who has for consideration acquired an interest in any of the properties."

The section refers to and safeguards only the interest of persons for consideration and not those of a volunteer. The right of marshalling may, as expressly provided above, be excluded by contract.

**Contribution to mortgage-debt.**

"The subject of contribution involve the determination of the proportions in which two or more owners of an estate, subject to a common charge, ought to contribute to its redemption ; or, and this is the same question in another aspect, the right which one of such persons, who has been compelled to discharge the common debt, has to be reimbursed by the others...a mortgage debt is one and indivisible, and if several distinct parcels of land are hypothecated to the creditor, which belong to two or more mortgagors, or subsequently pass to different owners, the creditor may, as a rule, proceed against any one of such parcels ; and the only way to prevent a sale or foreclosure, would be to pay the whole of the mortgage-debt. It is but reasonable that in such a case, the person who is compelled to discharge the common burden, should be permitted to seek indemnification from the

53. (1803) 8 Ves 382.

54. *Lanoy v. Duke of Athol*, (1742) 2 Atk. 444.

others and no fairer rule can be suggested than that each of them should contribute according to the value of the property owned by him or the extent of his interest in it. For the law would not suffer the creditor to select his own victim, and from caprice or favouritism to turn a 'common burden' into 'a gross personal oppression.'<sup>55</sup>

Section 82 of the Transfer of Property Act, accordingly, provides that where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage.

This section as amended by the Amending Act of 1920 has made two improvements on the original provision :

- (a) It covers cases not only where several properties are mortgaged but where the mortgaged property is subsequently divided into shares held in severalty ;
- (b) It fixes the date of the mortgage as the date at which the valuation of the respective share for the purpose of contribution should be made.

In *The Indian Overseas Bank Ltd. v. R.E.M. Ibrahim and others*,<sup>55a</sup> the Madras High Court recently held that "As the language of section 82 of the Act is explicit and clear in our view no alternative method can be adopted for purpose of ascertaining the rate at which persons who are jointly responsible to contribute should do so. The proposition has to be worked out with reference to the values of the hypothecation on the date of mortgage and not with reference to any other date. Any other date for such computation would in our view be irrelevant and ought not to be referred to for the purpose of ascertainment of the ratio in question.

### Subrogation.

The term 'subrogation' which means nothing more than substitution, was derived into jurisprudence of equity from the Roman Law. In the Roman Law, a surety upon a bond or security, paying it to the creditor, was entitled to a cession of the debt and a subrogation or substitution to all the rights and actions of the creditor against the debtor ; and the security was treated, as between the surety and the debtor, as still subsisting and unextinguished. And where one creditor had any hypothecation or privilege upon property, as security for a debt, and another for another debt ; there, the latter, upon payment of the prior debt to the prior creditor, was entitled to a cession of the property and to a subrogation to all the rights and actions of the same creditor for that debt.

The essential feature of subrogation is that the encumbrance that is paid off is not extinguished but is treated as kept alive and assigned to the person making the payment. The principle is that he who removes another's burden, steps into the shoes of the person whose rights constitute the burden. Subrogation is either conventional or legal. Subrogation is conventional or consensual when it arises by act of parties, *i. e.* when there is an agreement, express or implied, that the person making the payment shall have the rights and powers of the original creditor. Subrogation is legal when it arises by the operation of law when a person, who has in the property, an interest of his own to protect, discharges a prior encumbrance. The doctrine of subrogation does not

55. *The Law of Mortgages in India* by R. Ghose, 5th ed., pp. 393-394  
55a. A. I. R. 1976 Mad. 92.

depend upon a mere legal fiction but upon the most obvious principles of justice and equity and is recognized in one form or another in almost every system of law.

To entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt or security must stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected.<sup>55b</sup>

In English Law, the term 'subrogation' is generally used to denote substitution by the operation of law.

A payment by A to B may have the effect of swelling the assets or diminishing the liabilities of C, but it may not give A in law any direct remedy against C. In such a case, the Courts of equity allow A to stand in the shoes of B and to enforce against C in equity corresponding rights to those which B would have against him at law or in equity. A is treated as the assignee of B's claim against C and can enforce it, subject to all equities and rights of set-off which C may have against B.

A simple illustration of this principle is available in the case of necessities supplied to a deserted wife. At law, a husband who deserts his wife, is liable for necessities supplied to her, and they who supply them may sue him at law. But money, if is advanced to the wife to purchase necessities the money, although in fact so applied, cannot be recovered at law from the husband. In equity, however, a party who has advanced money to a deserted wife which is proved to have been actually spent in paying for necessities may stand in place of those who have furnished the necessities, and sue the husband directly for the amount. The same principle applies to payments made to an infant for necessities.\*

\* A common example of subrogation under English Law occurs in the case of an executor carrying on the business of his testator. If an executor is directed by a will to carry on the testator's business, he has a right as against persons claiming under the will, to be indemnified against the debts incurred in carrying on the business out of the assets appropriated by the testator to carry it on or acquired in the course of carrying it on. But the persons to whom the executor has incurred debts in carrying on the business, are at law creditors of the executor in his personal capacity merely. They are not creditors of the testator nor have they any claim at law upon any part of the testator's assets. In equity however, they are subrogated to the executor's right of indemnity and may stand in the executor's place against the testator's assets originally devoted or subsequently acquired in carrying it on.

In India, the doctrine of subrogation has been adopted through section 69 of the Indian Contract Act, 1872 and Section 92 of the Transfer of Property Act, 1888.

Section 69 of the Indian Contract Act enacts: "A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other". The words "bound by law to pay" extend to any obligation which is an effective bond in law; they cover obligations of contract or tort and they do not exclude obligations of law which arise *inter partes*, whether by contract or tort; and are limited to those public duties which are imposed by statute or general law.

Section 92 of the Transfer of Property Act relates to the right of

55b. Janaki Nath v. Promath Nath, (1940) 44 C. W. N. 261 (P. C.).

56. Marlow v. Pitfield, (1719) 1 P. Wms. 558.

subrogation in case of mortgages. It provides that any one (except the mortgagor) entitled to redeem the mortgaged property and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee, whose mortgage he redeems, may have against the mortgagor or any other mortgagee.

For instance, X mortgages his property first to A and then to B. C purchases the equity of redemption and pays off A the first mortgagee. C is subrogated to the rights of A and in an action by B to enforce his mortgage, C can use the prior mortgage in favour of A as a shield.

Similarly, A mortgages his property first to B, then to C, and then to D. The mortgage to D recited that there were no prior encumbrances except the mortgage to B. D discharges B's mortgage by a payment of Rs 1,830/-. Although D was not aware of the mortgage to C, he is subrogated to the rights of B and is entitled to priority over C in respect of the sum of Rs. 1,830/-.

Subrogation is of two kind, *i. e.* (a) legal subrogation, (b) conventional subrogation. Legal subrogation has been dealt with in the first clause of section 92 of the Act. It arises in favour of all persons who have an interest in the mortgaged property or in the right of redemption. The person desiring the legal subrogation must prove—

- (a) that he had pre-existing interest or charge on the property,
- (b) that he redeemed the same in full, and
- (c) that he paid the amounts from his own pocket for the protection of his interest.<sup>56a</sup>

Conventional subrogation has been dealt with in clause (3) of section 92 of the Act. It lays down that if a person advances money to a mortgagor for redemption of a mortgage, the lender shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed only if the mortgagor has agreed by a registered instrument that he shall be so subrogated.<sup>56a</sup>

The section does not cover the case of a mortgagee paying upon his own earlier mortgage but it was held<sup>57</sup> that the doctrine of subrogation is an equitable doctrine founded on principles of natural justice by no means confined to Section 92 of the Transfer of Property Act and it is wide enough to govern such a case.

In a recent case, the Kerala High Court has held that a partial redemption of mortgage cannot give rise to any right of subrogation.<sup>57a</sup>

The section also provides for subrogation by act of parties and it is permissible for a person to acquire the right of subrogation by agreement. But in order to have such a claim to subrogation, the section requires that there should be a registered instrument to that effect.

## LIENS

A lien, as defined by Story,<sup>58</sup> is not, in strictness, a *jus in rem* or a *jus ad rem* but it is simply a right to possess and retain the property subject thereto, until some charge attaching to it is paid or discharged.

Liens are either legal or equitable. Legal liens are those which were recognized by the common law while equitable liens are those which were recognized and enforceable only in Courts of equity. Among the many liens

56a. Laxmi Ramji v. Smt. Lohana Roa, A. I. R. 1970 Guj. 73.

57. Kanhaiya Lal v. Gulab Singh, 9 O. W. N. 387.

57a. T. Chelamma v. T. K. P. Parmaswaran, A. I. R. 1971 Ker. 3.

recognized by the common law may be mentioned that which entitles an artisan to retain an article delivered to him to work on until he is paid for the labour expended thereon or that which a partner has on the partnership property for what may be found due to him on taking the partnership account or those that exist in favour of warehousemen, auctioneers and bankers, etc. or the lien of the solicitor on the paper of his clients in his hands for his taxable costs, charges and expenses ; or the lien against a ship in respect of the ship's necessities.

The liens have been classified into those available by common law, by custom, by usage and by statute. Among the diverse liens recognized in equity alone, the two principal ones are : (i) vendor's lien for unpaid purchase-money, and (ii) vendee's lien for prematurely paid purchase money. Besides there is the equitable lien which a trustee has upon the trust estate for costs and expenses properly incurred by him in discharging the trust or that which a *bona fide* possessor in wrongful possession of property has for improvements made under the belief that he was absolute owner. Another important class of equitable lien is that which arises from a charge of legacies and portions upon real estates.

A legal lien differs from an equitable lien in the following two respects :

- (1) At common law, a lien is simply the right to retain another person's property until he pays the claim against him. In equity, on the other hand, the owner of an equitable lien has a right to a judicial sale to satisfy the lien ;
- (2) The common law lien is lost the moment the person having it, parts with the possession of the property subject to it. But an equitable lien, like every other equity, binds every person receiving the property even for value if such person had notice of the lien at the time he received the property subject to that lien.

A common law lien is distinguishable from a pledge in so far as the former gives simply the right to retain the property by way of security while the latter is generally accompanied with a power of sale. A pledge may be distinguished from a lien as a whole in so far as the delivery of possession of property is generally a necessary accompaniment of the former but not of the latter.

The two important classes of equitable liens that need be considered in some detail, are :

### 1. Vendor's lien on land :

The general principle as to the lien of the vendor of an estate is fully expressed in the judgment of Lord Eldon in *Mackreth v. Symmons*<sup>58</sup> which is to the following effect.<sup>59</sup>

Where a vendor, in compliance with a contract for the sale of an estate, executes a conveyance thereof, but the purchase-money is wholly or partially unpaid, then, notwithstanding that on the face of the conveyance it is expressed to have been paid, or that a receipt for it is endorsed thereon, the vendor has a lien on the estate for the money remaining due to him.

The vendor's lien is enforceable against the following :—

- (i) the purchaser himself and his heirs and all persons taking under him or them as volunteers,

58. Story's Equity Jurisprudence, 3rd ed., p. 331.

59. 15 Ves. 329.

60. The Principles of Equity by H. A. Smith, 4th ed, p. 335.



- (ii) subsequent purchaser of the property in question for valuable consideration but with notice of the existing lien. The right being merely "equitable", the English Court of Chancery acting upon the well-known maxim 'Equity follows the law, could not suffer it to be enforced against a *bona fide* purchaser for value of the legal estate without notice of the lien ;
- (iii) the assignee in bankruptcy of the purchaser.

It is open or possible for the vendor to abandon or waive his lien. It depends on the intention which may be apparent or inferred from conduct or circumstances of each case *e. g.* where the vendor takes another security for the purchase-money as a substitute of the lien. The lien cannot, however, be supposed to have been waived or substituted by a personal undertaking for the payment *e. g.* the execution of a bond for the sum due.<sup>61</sup> The vendor may also lose his lien by laches or when it becomes barred by the Statute of Limitation.

## 2. Vendee's lien on land.

The vendee has, in the same way, a lien upon the estate in the hands of the vendor in case he has paid the purchase-money or any part of it prematurely, as for instance by way of deposit. In case the contract is after such payment, rescinded, or cannot be enforced owing to want of title in the vendor or is for any proper reason disclaimed by the vendee, he has a lien on the estate in the hands of the vendor for the money so paid.

The principles applicable to a vendor's lien are equally applicable here. In either case, where the contract is not completed and the failure to complete is due to the default of the person having the lien, the lien, is defeated ; if it is due to the default of the other party, it can be enforced by a sale and the money due together with interest and costs would be recoverable therefrom.

When the lien arises by express contract, it is called usually not a lien but a charge. However, for all practical purposes, a lien and a charge are identical.<sup>62</sup>

## INDIAN LAW

### Definition of charge.

In India, we have a statutory provision with regard to charges under Section 100 of the Transfer of Property Act, which defines a charge as follows :

"When immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.....".

The difference between a charge and a mortgage has been explained already.<sup>63</sup> For the purposes of this definition, it need only be noted that if the payment of money is secured on immovable property but no interest in that property is actually transferred, the transaction will amount to a mere charge. In case of mortgage as well as in a charge the property of another person is made security for a loan as debt ; but whereas a mortgage is a transfer of an interest in a property, a charge does not involve the transfer of any interest in the property. <sup>63a</sup>

61. Collins v. Collins, (1862) 31 Beav. 396.

62. Strahan's Digest of Equity, 3rd ed., p. 352.

63. See p. 116, *supra*.

63a. (1969) 1 T J 14 (Bom).

It is, however, important to note that a transaction intended to be a mortgage, but not reduced to writing and registered so that it cannot operate as a mortgage, will not be effective as a charge. The rule as laid down by Mookerji, J., in *Gobind Chandra v. Dwarka Nath*<sup>64</sup> is as follows :

"If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be mortgage. The fact that the necessary formalities of due execution were wanting, would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge."

In order to creation a charge it is not necessary to employ any technical or any particular form of words. All that is required is that there must be a clear intention to make a particular property a security for the payment of money.<sup>64a</sup>

Charge, as a defined by this section, covers both a charge created by act of parties and a charge arising by the operation of law.

#### Charge by act of parties.

A charge is generally created by a settlement or will by which the property of the settlor or testator is specially appropriated to the discharge of a portion or legacy or debt or the support of a religious or charitable endowment or any other obligation existing upon or undertaken by the settlor or testator. A charge, however, need not be in writing and may be created orally ; but if it is created by an instrument in writing, it must, under Section 17 (1-b) of the Registration Act, 1903, be registered unless it is made by a will or the amount secured is less than one hundred rupees. A charge does not require to be attested.

The following case may be noted as illustration of a charge created by acts of parties :

- (i) A inherited an estate from his maternal grandmother and executed an agreement to pay his sister B, a fixed annual sum out of the rents of the estate. B has a charge on the estate.<sup>65</sup>
- (ii) A sued B on a promissory note. The compromise decree directed the payment of the money and further directed that B shall not dispose of his share in a factory until satisfaction of the entire decretal amount. It was held that A had a charge on the property specified.<sup>66</sup>

The property to which the charge attaches must be specified, otherwise the charge would be void for uncertainty.<sup>67</sup>

#### Charge by operation of law.

Section 100 of the Act only refers to and includes within its ambit charges arising through the operation of law but does not mention the cases or circumstances in which they may or do arise. The reference to such charges in the section is, it may be submitted, only for the purpose of giving them the same meaning and incidents as those created by act of parties. For the actual cases of charges by operation of law one has, therefore, to look to

64. (1908) 35 Cal. 837.

64a. A. I. R. 1967 S. C. 1631

65. Chalamanna v Subbamma, (1884) 7 Mad. 23.

66. Narain Das v. Murlidhar, (1929) 121 I. C. 81.

67. Mohini Debi v. Purna Sashi, (1932) 36 C. W. N. 153.

other provisions or sections of this Act or those of others. As illustrations of charges by operation of law, we may note the following :

- (i) *Vendor's lien for unpaid purchase-money.*—This is provided for by Section 55 (4) (b) of the Transfer of Property Act, 1882 in these terms : “Where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with the notice of the non-payment, for the amount of the purchase-money or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession has been delivered.”
- (ii) *Vendee's lien for purchase money paid prematurely.*—The law on the point, as contained in Section 55 (6) (b) of the aforesaid Act, is as follows : “The buyer, unless he has improperly declined to accept delivery of the property, is entitled to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and when he properly declines to accept the delivery, also for the earnest money (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.”

The above two provisions are similar to the corresponding equitable lien under English Law and with regard to the question how far these provisions or their importation from English Law are appropriate and suitable to the Indian legal system, Sir Rashbehary Ghose simply observed : “...like the lien of the unpaid vendor, the purchaser's lien for purchase money prematurely paid by him seems to have been taken for granted in this country, as a doctrine based upon the most unimpeachable equity. It would, however, be idle to criticise a rule which has now found a place in the Statute Book.”<sup>68</sup>

- (iii) The right of maintenance, even of a Hindu widow, is only a floating charge which does not crystallize till some specific property is set apart either by agreement or by a decree of Court. The law on this point as also on other analogous rights which was previously in a somewhat nebulous condition, has now been settled and the rights are now secured by Section 39 of the Transfer of Property Act, 1882 as amended by the Act XX of 1929, which provides : “Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous ; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.”
- (iv) Similarly Section 51 of the Transfer of Property Act lays down the equitable rule with regard to the improvements made by the holder of a defective title :

“When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled

thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement."

- (v) Arrears of Government revenue are a permanent charge on the land and many of the local Revenue Acts have been treated to create a charge under the Transfer of Property Act.

Section 100 of the Transfer of Property Act, it need be noticed, expressly excludes from its ambit charges which a trustee has for costs and expenses properly incurred by him in the execution of the trust. It says: "Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust.

This is, however, provided for and secured by Section 32 of the Indian Trusts Act, 1882, which gives the trustee a right to reimburse himself or pay or discharge out of the trust property, all expenses properly incurred in or about the execution of the trust. The only object or effect of the exclusion of this case from the purview of Section 100 is that the trustee's right in respect of such expenses is limited to re-imbursement from the income and profits of the trust estate and his only remedy for the charge upon the trust property is, as provided for by Section 32 of the Trusts Act, to prohibit any disposition by the trust property without previous payment of his expenses and interest. While he is a trustee, he cannot destroy the trust property by bringing it to sale. But after he has ceased to be a trustee or after he has lost possession of the trust property, he may enforce his charge by sale."<sup>69</sup>

Section 100 puts charges whether by acts of parties or through the operation of law on the same footing as a simple mortgage and with regard to the remedies of the charge-holder or other things, it is provided that "all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge." Under the provisions of this section read with O. 34, R. 15 of the Code of Civil Procedure, 1901, a charge, like a simple mortgage, is enforced by the sale of the property subject to it. If the charge carries with it a personal liability, the charge-holder is entitled, under O. 34, R. 6 of the Code of Civil Procedure, 1908 to a personal decree.

The charge is enforceable against every one in whose hands the property subject to the charge may be except when it is "in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."<sup>70</sup> This is of course, subject to any provision to the contrary which he expressly made by any law for the time being in force.

It is submitted that the various liens provided for under the Indian Contract Act, 1872, partake of the nature and incidents of a common law lien where the right is confined to retaining the property in question till payment of the claim and it is lost if the possession of the property in question is lost or parted with. Mention need be made of the following provisions on the point in the Indian Contract Act, 1872 :

- (a) *Lien of the finder of goods*.—"The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily

69. *Abkan Sahib v. Soran Bivi*, (1915) 38 Mad. 260 ; *Peary Mohan Mukerjee v. Narendra Nath*, (1901) 37 I. A. 27.

70. Section 100, Transfer of Property Act, 1882.

incurred by him to preserve the goods to find out the owner ; but he may retain the goods against the owner until he receive such compensation ; and where the owner has offered a specific reward for the return of goods lost ; the finder may sue for such reward and may retain the goods until he receives it." (Section 168).

Section 169 gives the finder the right of the sale when the goods are of a perishing nature or the finder's charges amount to two-thirds of the value of goods, provided the owner cannot be found or refuses to pay the lawful charges.

- (b) *Lien of a bailee*.—"Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, *in the absence of a contract to the contrary*, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

"A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services rendered.

"A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as it is finished *and to give A three months' credit* for the price. B is not entitled to retain the coat until he is paid."—Section 170.

- (c) *Liens of bankers, etc.*—"Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for general balance of account, any goods bailed to them : but no other persons have a right to retain as a security for such balance, goods bailed to them unless there is an express contract to that effect."—Section 171.

A bailee has no right to sell the goods bailed unless such right is conferred upon him by agreement of the parties or by any special statute ; on the other hand, a sale of goods bailed to him in the exercise of his right of lien over the goods, causes the loss of the lien.<sup>71</sup>

- (d) *Lien of a pawnee*. "The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged."—Section 173.
- (e) *Lien of an agent*.—"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him." Section 221.

It is well-settled that the lien of an agent is a mere right to retain possession of the property subject thereto and is, as a general rule, lost by his parting with the possession.<sup>72</sup>

71. *Scindia Steam Navigation Co. v. Trustee of Port of Karachi*, 122 I. C. 388.

72. *Kishun Das v. Ganesh Ram*, A. I. R. 1950 Pat. 481, 483.

## CHAPTER IX

### MARRIED WOMEN

With the exception of the equitable doctrines of restraint and a wife's equity to a settlement, married women's property seems not a proper subject for detailed discussion in a treatise on equity, but rather a matter for the law of property generally,<sup>1</sup> and even in that restricted sphere the, equitable doctrines on the subject have for the most part been rendered obsolete by successive Married Women's Property Acts and the importance of the subject is now more or less historical only.<sup>2</sup> More recent and other legislative measures<sup>3</sup> on the subject have almost completely abrogated the common law status of the married women. The importance of the subject under the Indian legal system for the purposes of a book on equity is even less than what it is for the present in England. It is, therefore, proposed to give only a brief outline of the whole subject with special reference to some of its more important features.

#### Position of married women at Common Law.

The nature of a married woman's position at Common law may be best described in the words of Blackstone: "By marriage the husband and wife are one person in law, *i. e.*, the very being or legal existence of a woman is suspended during the marriage or at least is incorporated or consolidated into that of the husband, under whose being, protection and cover she performs everything.....Upon this principle of an union of persons in husband and wife depend all the legal rights, duties and disabilities that either of them acquires by marriage."<sup>4</sup>

Similarly, Bacon's Abridgement states that so long as the marriage relation continues, "the law looks upon the husband and wife but as one person, and therefore, allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family", and consequently "the husband hath by law power and dominion over his wife".<sup>5</sup>

The effect of this doctrine may be summarized as follows :

- (i) There could be no contract between the husband and wife during coverture and the pre-nuptial contract between them, if any, was avoided by marriage since it would otherwise amount to the wife possessing a distinct and separate existence from that of the husband. So none could sue or be sued by the other.
- (ii) The wife could not, during coverture, sue or be sued by a third person in tort or for contract without the husband being or being made a party to the same.
- (iii) The property of the wife, by marriage, vested in or became subject to the absolute use and dominion of the husband<sup>6</sup> and the

1. Strahan's Digest of Equity, 3rd ed., p. 360.

2. Story's Equity, Jurisprudence, 3rd ed., p. 949.

3. Law of Property Act, 1925, Settled Land Act, 1925, Administration of Estates Act, 1925 and Law Reforms (Married Women and Tort-feasors) Act, 1935.

4. Blackstone's Commentaries, Vol. I. C. 15, p. 442.

5. Bacon's Abridgement, 7th ed., B. & F., C. (1).

6. See p. 57, *supra*.

wife was incapable of holding property independently of her husband.

The extensive rights and powers of the husband over the wife and her property were in lieu of his obligations to maintain the wife properly. But the wife had no remedy at law if the husband refused or neglected to discharge his obligation to the wife. The wife had no remedy even in case of her husband's insolvency or bankruptcy. Thus, the common law Courts did not contemplate or recognize the separate existence of a married woman and her position, during coverture, was at common law, no better than the beneficiary under a trust or the mortgagor in a forfeited mortgage.

#### **Position of married women in equity.**

The position or status of the wife at Common law being as stated above, the Courts of equity had ample opportunity and justification for interfering in these matters with a view to mitigate some of the disabilities under which a married woman laboured at common law and ensure justice and equity to her. The innovation made by the Court of Chancery in the exercise of this jurisdiction has been generalised by Story in the following lines :

"Now in Courts of Equity, although the principles of law, in regard to husband and wife, are fully recognized and enforced in proper cases, yet they are not exclusively considered. On the contrary, Courts of Equity, for many purposes, treat the husband and wife, as civil law treats them, as distinct persons, capable (in a limited sense) of contracting with each other, of suing each other and of having separate estates, debts and interests. A wife may, in a Court of equity, sue her husband and be sued by him. And in cases respecting her separate estate, she may also be sued without him ; although he is ordinarily required to be joined for the sake of conformity to the rule of law, as a nominal party, whenever he is within the jurisdiction to the court ; and can be made a party."<sup>7</sup>

The husband's common law rights were modified by the Courts of equity in two important spheres :

1. *Wife's equity to settlement*.—This has been considered already<sup>8</sup> and nothing need be added to this in the present context.
2. *Wife's separate estate*.—The Courts of equity considered the wife to be capable of holding property independently of her husband and on that principle, recognized the separate estate of a married woman and for that purpose, treated her as a *feme sole*. We need, therefore, consider the manner in which a wife could acquire a separate estate and her powers and interests therein.

The Courts of equity held from an early period that property either belonging to the wife at the marriage or devolving upon her afterwards, might be affected by a trust giving her the exclusive enjoyment of the property, and enabling her to exercise exclusive control over it, notwithstanding coverture. Such property was said to be held to her separate use and to be her separate property. If trustees were appointed, it was their duty to see that the married woman received herself the property and its profits and if no trustees were appointed, then though the property vested in law in her husband, equity constituted him as trustee of it for the same purpose.

Before the Married Women's Property Act, 1882, separate property arose as follows :

7. Story's Equity Jurisprudence, 3rd ed., p. 950.

8. See pp. 57-58, *supra*.

1. By ante-nuptial agreement between the intended husband and wife with regard to properties being held for the separate use of the wife. Such an agreement could be made with reference either to the wife's own property or with reference to the property of her husband or of third parties ;
2. the husband might, during coverture, abandon his marital rights over any property acquired by his wife and allow her to retain it for her separate use or might give her property of his own for her separate use ;
3. by a gift by a stranger to the wife for her separate use ;
4. property given to an unmarried woman for her separate use became subject to the separate use upon her marriage ;
5. the wife's earnings while she was deserted by the husband were treated in equity as her separate property ;
6. the savings of the wife's separate maintenance, of her pin-money,\* and of her separate estate, whether she retained them in form of cash or invested them in land, formed part of the separate estate.

No particular form of words, whether in a settlement or will, is required to vest property in a married woman to her separate use. Whatever the words, it must only indicate clearly and unequivocally the intention to reserve the property to the separate use of the wife in opposition to the legal rights of the husband.

Having thus established the capacity of a married woman to hold property in equity, the Court held that she could sell it, leave it by her will or contract so as to bind it. A married woman, however, was presumed both in equity and law to contract as her husband's agent, and her debts accordingly could be satisfied out of her separate estate only when she contracted in respect to it. The separate use was established to protect the wife during the coverture against her husband. Accordingly, when she died during coverture her husband's common law rights in respect of the wife's properties revived except in so far as such properties were disposed of by the wife.

This was the state of the law as to trusts for married women's benefit before the passing of the Married Women's Property Act, 1882, which converted the equitable rights of the wife stated above, into a legal right and at the same time, extended the area of the separate property. The provisions of this Act may be classified under two heads :

- (1) A married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding or disposing of by will or otherwise, any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee.
- (2) A married woman shall be capable of entering into and rendering herself liable in respect and to the extent of her separate property on any contract or in tort or otherwise, in all respects as if she were a *feme sole*.

The remainder of this Act in the main consists of provisions for the

9. Pin-money may be described as an allowance settled upon a wife before marriage for the purpose of her separate personal expenditure. It is designed to defray her personal expenses, and to purchase dress and ornaments suitable to her husband's rank, so that it shall not be necessary for these purposes that she should be continually applying to her husband for money.



application of the principles thus broadly expressed. The effect of this and the subsequent Acts on the point is that the husband and wife have now almost been placed on a footing of juristic equality.

*Restraint on anticipation.*—The clause against anticipation, as it is usually called, was invented by Lord Thurlow for the purpose of protecting the wife's property, in the words of Lord Brougham, from the kicks or kisses of her husband. A married woman, being at liberty to dispose of her separate property was, besides her own improvidence, in danger of yielding to the solicitations of her husband to dispose it of. In order, therefore, to preserve the separate property of a married woman from such alienations, a clause was frequently added to the separate use of the wife to the effect that she should not have the power to alienate the property or to anticipate the enjoyment of the income thereof. The question, however, was whether such a direction could be upheld in equity. Such a clause would certainly have no effect in a limitation of property to a man or to an unmarried woman from whom the right of disposing of the property cannot be taken away by a mere prohibition but when the matter came before the Court, the case of a married woman's separate estate was held to be distinguishable, and restraint or anticipation was deemed just and reasonable, inasmuch as it tended to further the very object for which separate estate was first created.

The clause against anticipation is, accordingly, valid and efficacious in a settlement or a demise to a married woman, whether the property in question be real or personal estate, whether limited in fee or absolutely, or for life only. The validity of such a clause was recognized and allowed by the Married Women's Property Act, 1882, Section 19 of which provides that nothing in the Act is to interfere with or render inoperative any restraint on anticipation. But there can be no restraint where there is no separate estate either equitable or statutory. The restraint is confined to coverture.

Like a separate use, no particular form of words is necessary to restrain alienation. The words, whatever they may be, must indicate a clear intention to that effect.

A condition in the trust instrument, restraining a married woman from alienating the trust property or anticipating the income of it so long as she is married, is good.

So strictly was the restraint on anticipation regarded that it formerly could not be dispensed with by a Court of equity, even where it was manifestly for the benefit of the married woman to do so. But by Section 39 of the Conveyancing Act, 1881, which has been re-enacted by Section 169 of the Law of Property Act, 1925, the Court has been empowered to release the restraint with the consent of the wife if the Court thinks it to be for her benefit, or deems it otherwise to be fit and equitable to dispense with the restraint on alienation.

In modern days, it came to be recognized that the restraint was rarely necessary to protect a wife from the husband's solicitations and that it was often unfair to her creditors. The Law Reform (Married Women and Tortfeasors's) Act, 1935 (Section 2) accordingly, provided for its eventual abolition by prohibiting new restraints after 1935. The Married Women (Restraint upon Anticipation) Act, 1949, ultimately abolishes all restraints which could not have been attached to the enjoyment of property by a man.

#### **Position of married women under the Indian Law :**

In India, in case of persons, other than Hindus, including Buddhists, Sikhs or Jains and Mahomedans, the position of a married woman is almost the same as in England based on equitable doctrine introduced by the Courts of

Chancery and later incorporated in various enactments on the point referred to above.

Section 20 of the Indian Succession Act, 1925, re-enacting Section 4 of the Indian Succession Act, 1865, accordingly provides :

(1) "No person shall by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried."

The section does not apply to any marriage contracted before the first day of January, 1866, nor to marriages where one or both of the parties at the time of marriage are Hindus, including Buddhists, Sikhs and Jains or Mohamedans.

This section, therefore, so far as regards property, abolishes by implication, the doctrine of unity of persons between husband and wife,<sup>10</sup> and the wife has as much control over her properties as if she were unmarried. Further, Section 10 of the Transfer of Property Act, 1882, while enacting that a condition restraining the alienation of property, transferred is void, makes an exception in case of married women through the proviso that property may be transferred to or for the benefit of a woman (not being a Hindu, Mohamedan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same on her beneficial interest therein.

The main Act on the point, limited to persons other than Hindus and Mohamedans, is the Married Women's Property Act, 1874. The scope of the Act is broadly yet quite clearly indicated by the preamble which, referring to the above-quoted provision, states :

"And whereas by force of the said Acts, all women to whose marriages it applies, are absolute owners of all property vested in, or acquired by them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives..." It is enacted as follows :

Section 4 enacts that a married woman's earnings, together with all the savings therefrom and investments thereof, from any employment, occupation or trade carried on by her or through the exercise of any literary, artistic or scientific skill shall be her separate property.

Section 7 of the Act provides that a married woman may sue and be sued in her own name with regard to her separate property in the same way as if she were unmarried.

Section 8 of the Act, while providing for the wife's liability in respect of all contracts in respect or on the faith of her separate property, makes a proviso for restraint on anticipation. It says :

"...nothing herein contained shall entitle such person<sup>11</sup> to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage, to transfer or charge the same or her beneficial interest therein."

Sections 9 and 10 provide that the husband shall not be liable for the

10. *Proby v. Proby*, 5 Cal. 357.

11. That is one who has entered into a contract with wife in respect of her separate property.

wife's ante-nuptial debts or, unless he intermeddles therein, for any breach of trust or devastation committed by her.

The validity and enforceability of a restraint on anticipation with regard to a trust in respect of the separate property of a married woman is, on the equitable ground explained above, recognized and provided for by the Indian Trusts Act, 1882.

Section 56 of that Act, while entitling the sole beneficiary or all the beneficiaries if *sui juris* and of one mind to take, at their pleasure, the trust property from the trustee, makes an exception with regard to a married woman and disables her from claiming the trust fund or property, "if it has been transferred or bequeathed for her benefit without power of anticipation".

Further, Section 58 of the Act, while providing for the right of a beneficiary, if competent to contract, to transfer his beneficial interest in the trust property makes, on the same principle, an exception with regard to a married woman if the property is settled upon her for her separate use without power of anticipation.

A similar reservation has been made by Section 68 of this Act in connection with the liability of the beneficiaries who have induced or concurred in the breach of trust.

The position of a married woman under Hindu or Mohamedan Law in respect of the rights and disabilities considered above, except restraint on anticipation, is, in effect, not very much different from what has been represented above, to be the English Law or the Indian Law in respect of non-Hindus and non-Mohamedans. A detailed discussion of the topic under these personal laws would not be suitable for the purposes of this book and must be left for a study under those laws.

It may, however, be stated that the doctrine of coverture is not recognized under Mahomedan law *i. e.*, a woman does not by marriage merge her existence into that of her husband but retains her separate legal entity and accordingly she can deal with her property in any way she likes without her husband's consent. A Mohamedan husband does not by marriage acquire any interest in the wife's property.<sup>12</sup>

The doctrine of coverture is a part of Hindu Law but a married woman is capable of holding her separate property and except in certain cases, she has absolute dominion over them. Under the Hindu Law, a married woman is competent to retain or acquire separate property for her which is called her *Stridhana i. e.*, woman's property. The various sources of *Stridhana* are : gifts and bequests made to her from relations or from strangers ; property, acquired by her by mechanical arts or given to her in lieu of maintenance....etc. together with property purchased with the *Stridhana* or savings or income therefrom. In so far as the enjoyment, dominion or disposition of such property is concerned a woman, during maidenhood and widowhood, if not a minor, has an absolute power of disposal over every kind of *Stridhana*. During coverture, the married woman has the same unrestricted power with regard to such *Stridhana* which has been acquired through gifts or bequests from relations. The husband has no control over it. He cannot bind her by any dealings with it. He can, however take it in case of distress, as in a famine, or during illness or imprisonment. As regards *Stridhana* other than those referred to above *i. e.*, gifts from strangers, property acquired from mechanical arts etc., the rule is that a married woman has no power to dispose of it during

coverture without the consent of her husband. It is subject to her husband's dominion and he is entitled to use it at his pleasure even if there be no distress. After the husband's death, her power to dispose of it becomes absolute, and she may dispose of it by means of a transfer *inter vivos* or through a will.<sup>13</sup>

Before the coming into force of the Hindu Succession Act, 1956, the widow, as the surviving half of her husband, succeeded to his properties. But she acquired only a limited estate therein called the widow's estate. She had only a life-interest in the properties so inherited and was entitled only to the income of the same without, generally speaking, the power to dispose of the corpus and on her death the property was inherited not by her heirs but the reversioners or the next heir of her husband. More or less, the same rule was applicable in case of the female heirs *i. e.*, daughters, mothers, etc.

Section 14 of the Hindu Succession Act, 1956, now enacts that a female Hindu would take, through inheritance, as an absolute owner, and this would apply to all properties whether acquired before or after the Act. The object of the section is to improve the legal status of Hindu woman enlarging their limited interest in the property inherited or held by them to an absolute interest, provided they were in possession of the property when the Act came in force. The section covers all cases of property owned by a female Hindu although she may not be in actual physical or constructive possession, of the property provided that she has not parted with the right of obtaining possession<sup>14</sup>. The woman's life-interest is, however, still retained with regard to land tenures<sup>15</sup> in certain cases irrespective of the religion or personal law of the tenure-holder.

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13. Mulla, Hindu Law, 11th ed., pp. 137-139.

14. Mangal Singh v. Rattno, A. I. R. 1967 S. C. 1786.

15. See for instance, the U. P. Zamindari Abolition and Land Reforms Act, 1951—Secs. 172 to 174.

## CHAPTER X

### INFANTS

The Court of Chancery, from the earliest times, exercised jurisdiction over infants and that jurisdiction has now been assigned to the Chancery Division of the High Court of Justice. The jurisdiction is found on the prerogative of the Crown as *parens patriae* which was formerly vested in and exercised by the Court of Wards. On the abolition of the Court of Wards, this jurisdiction reverted to the Court of Chancery. The Court of Probate also has power to make order as to the custody of infants during their minority.<sup>1</sup>

The aim of guardianship is to shield persons in need of protection on account of their infancy, lunacy, or other defects. The two main questions with regard to guardianship as a whole, are :—

- (1) the appointment and removal of a guardian by the Court ;
- (2) the rights, duties and liabilities of the guardian.

The strict common law gave to the father the guardianship of his children during the age of nurture and until the age of discretion. The limit was fixed at fourteen years in the case of a boy and sixteen years in the case of a girl. It is now settled that the father's legal right of guardianship continues till the infant attains the age of twenty-one. The father has also the right, to appoint by deed or will, a guardian for their children. In case of an illegitimate child, the mother has the same legal right to the custody and control of the child as the father of a legitimate child.

The Court has, however, full jurisdiction over infants whether the father is living or dead and if the Court is satisfied that the children are not being properly treated or looked for, it will interfere with a father's guardianship ; but a strong case, e. g. insolvency, loathsomeness and corrupt conduct or neglecting or illtreating the child, must be made for the removal of the father from guardianship. Any person is entitled to apply to the Court as next friend to the infant for the appointment or removal of a guardian. In case the authority as to guardianship is exercised by the Court through another person, the wishes of the father must be regarded by the Court and must be enforced unless there is strong reason for disregarding them. The wishes of the father, if not expressed, must be inferred from his conduct. In the appointment or removal of a guardian, the welfare of the minor is the first and paramount consideration for the Court, though in general, the Court will enforce the wishes of the infant's natural or testamentary guardian unless they be unreasonable.

Once a person has been made a ward of the Court all dealings with his property and person are subject to the sanction of the Court. The sanction of the Court is also essential in the case of marriage of wards. Whether they be male or female and whether or not they have parents or guardians living, it is necessary to apply to the Court for permission before their marriage can take place. To marry a ward without such permission is a gross Contempt of Court and all persons, aiding and abetting the marriage, are liable to imprisonment.<sup>2</sup> Ignorance of the fact that the infant

1. *Thomasset v. Thomasset*, [1894] p. 295.

2. See *Eyre v. Countess of Shaftsbury*, (1722) 2 P. Wms. 103, 112.

is a ward, does not excuse the contempt, though it may mitigate the consequences. Another prominent feature in the jurisdiction of the Chancery Division respecting infants, is its power, in certain cases, to make provision for their maintenance out of the income of their property. In deciding as to the necessity for the maintenance, its amount and the property from which it may or must be met, the Court will consider the state and condition of the whole family, the circumstances of the parents and the amount or nature of the property available for or bound by the same.

The subject is now covered and mainly governed by various enactments on the point under English Law : Guardianship of Infants Act, 1952, etc.

#### The law in India :

Under all legal systems, it is the personal law of the ward which governs question arising out of the ward's need for protection. On the question of guardianship, therefore, Hindu law, being the personal law, should be applicable when the ward is a Hindu and similarly Mohammedan Law in case the ward is a Mohammedan. The Hindu and Mohammedan Laws on guardianship do not, however, retain unrestricted application in this sphere but have become considerably qualified or abrogated by the Guardian and Wards Act, 1890 and the Indian Majority Act, 1875, which are based on the English Law on the point and represent the general territorial law of India. Hence, except in so far as the application or consideration of the Hindu and Mohammedan Law has been expressly or may be supposed to have been impliedly reserved, all questions relating to minority or guardianship would be governed by those Acts.

For all persons domiciled in India, irrespective of his religion or personal law, Section 3 of the Indian Majority Act, 1875, fixes the age of majority at eighteen years except—

- (i) those for whose person or property or both, a guardian has been or shall be appointed or declared by any Court of justice before his attaining the age of eighteen years ; and
- (ii) those of whose property the superintendence has been or shall be assumed by any Court of Wards, before his attaining the age of eighteen years ;

in which case majority is attained on the completion of twenty-one years of age.

It need, however, be noted :

Firstly : That the Act does not cover the capacity of any person to act in respect of marriage, dower, divorce and adoption or the religion or the religious rites and usages of any class which is governed by the personal law or religion of the person concerned.

Secondly : That section 32 of the Code of Civil Procedure provides for the appointment and removal, etc. of a guardian *ad litem* for a minor, lunatic or idiot for the purposes of a suit by or against him. Such minors do not come within the exception pointed out above, and like any other, become major on attaining the age of eighteen years only and not twenty-one.

As mentioned above, the general territorial law on the subject of guardianship in India is the Guardian and Wards Act, 1890. It is based on and repeals the European British Minors Act, 1874 which, while in force, was applicable to the European British subjects and was similar to the English Law on the point. The scheme of the Act is to entrust the District Court with the duty of looking after the 'welfare of the minor's person and property and for that purpose gives it the power to regulate or enforce (i) the appointment and

declaration ; (ii) the duties, rights and liabilities and (iii) the removal and discharge of a guardian. The scheme of the Act is clearly indicated by the following speech of Sir Courteney Ilbert, while introducing the bill into the Legislative Council in the year, 1886 :

“Nothing can be further from my intention than to interfere with native customs or usages or to force Hindu or Mohammedan Family Law into unnatural conformity with English Law. But on looking into the European British Minors Act, which was framed with special reference to the requirements of what may be called English minors, it appeared to me that almost all its simple and general provisions are applicable to Hindu and Mohammedan as well as to English guardians .....Accordingly what I have done has been to take as my model the European British Minors Act which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its outlines an Act applicable as a whole to all classes of the community, but containing a few provisions limited in their application to particular classes. It is not intended by this measure to make any alteration in Hindu or Mohammedan Family Law.”

The only material exception to the general application of this Act, irrespective of caste or creed, lies with regard to the choice of a guardian. In appointing or declaring the guardian of a minor, the Court is, by Section 17 (1) of the Act, required to take into consideration the personal law of the minor. The preferential claim of an individual is, therefore, to be decided according to the personal law of the minor and would prevail unless the welfare of the minor which is of paramount consideration in the matter, requires otherwise.

Section 19 (a) of the Act enacts a general provision with regard to the guardianship of a married female and provides that the Court has no power to appoint a guardian of such minors unless the husband is, in the opinion of the Court, unfit to act as such. This, it may be noted, is in conformity with the Hindu and Mohommedan Laws on the point.

With regard to European British subjects, section 19 (b) of the Act recognizes the natural and preferential claim of the father to act as a guardian of his minor children and if the father is alive and not otherwise unfit in the opinion of the Court to act as a guardian, the Court has no power to appoint a guardian. Such questions regarding guardianship which are not governed or covered by the personal law, may be decided according to the equitable doctrines similar to English Law. This is indicated by the following observations made in *Ma Mya v. Felix Slyn* :<sup>3</sup>

“In dealing with the custody of illegitimate children the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of these rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. This equitable rule should be adopted in the case of parties in this country whose personal law is obscure.”

The High Courts in India have a power to appoint a guardian of the person and property of minors independently of the Guardian and Wards Act. This jurisdiction or power was vested in the High Courts by the Letters Patent establishing them and extends, besides infants, to idiots and lunatics.

## CHAPTER XI

### IDIOTS AND LUNATICS

The subject does not, strictly speaking, fall within the scope of a treatise on equity. It did not form part of the jurisdiction of the Court of Chancery.<sup>1</sup> The jurisdiction in Lunacy, existed long before the Court of Chancery came into existence. A precise statement on the history of this jurisdiction under English law may be made through the following except from Smith's Principles of Equity :

"The Crown, by virtue of its prerogative, has the right to assume the care and custody of the persons and estates of those who are of unsound mind. For the purpose of its exercise, the Crown by Sign Manual delegated its authority usually to the Lord Chancellor, as its highest judicial officer, not however, *ex-officio* as president of the High Court of Chancery. In 1851 the Lord Justices were appointed to constitute a Court of Appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery and shortly afterwards they were entrusted by a warrant under the Queen's Sign Manual with the care and custody of lunatics. On the passing of the Lunacy Regulation Act in 1853, this jurisdiction was confirmed and continued with that of the Lord Chancellor. By the Judicature Act, 1873, Section 7, it is enacted that : "Any jurisdiction usually vested in the Lord Justices of Appeal in Chancery or either of them, in relation to the person and estates of idiots, lunatics and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be entrusted by the Sign Manual or Her Majesty or her successors with the care and custody of such persons and estates."<sup>2</sup> The jurisdiction is now exercised by the Lord Chancellor, the Master of the Rolls and the Lord Justices.<sup>3</sup>

The procedure in lunacy matters is now regulated by the Lunacy Act, 1890, which repeals and re-enacts with certain variations the similar provisions contained in the Lunacy Regulation Act, 1853.

A person of unsound mind is, usually, found a lunatic on due inquisition and a committee is then appointed of the person and property of the lunatic. After the appointment of the committee, no person can institute any proceeding on behalf of the lunatic except with the leave of the Court in Lunacy. The Lunacy Act, 1890, contains various directions and authorises the committee regarding the management of the lunatic's estate ; and when these directions and authorities do not suffice, or are inapplicable, the Court in Lunacy will, by virtue of its general jurisdiction, give any special direction.

In India the subject is governed by the Indian Lunacy Act, 1912, which is based on English law on the point as is evident from the following Statement of Objects and Reasons attached to the Lunacy Bill :

"It is in the opinion of the Government of India, desirable that the law relating to the custody of lunatics in India should be amended and assimilated with the modern English law on the subject and the present Bill has been prepared to effect this purpose."

1. Beall v. Smith, (1873) 9 Ch. App. 85, 92.

2. 4th ed., pp. 475-476.

3. Snell's Principles of Equity, 24th ed., p. 493.



The main provisions of the Act are :

- (i) *The reception, care and treatment, and discharge, etc. of a lunatic.*—An application for confinement of a lunatic (not being a lunatic so found on inquisition) in an asylum is made by petition, accompanied with necessary particulars, to the Magistrate within the local limits of whose jurisdiction the alleged lunatic ordinarily resides. The petition must be presented by the husband or the wife and failing them by the nearest relative of the alleged lunatic. The Magistrate may after due enquiry, either make a reception order or dismiss the application. Before passing the reception order, the Magistrate must, unless the lunatic is dangerous or unfit to be at large, be satisfied that the person in charge of an asylum is willing to receive the lunatic and that some one binds himself to pay the cost of maintenance of the lunatic.
  - (ii) *Judicial inquisition as to lunacy.*—The Act lays down the procedure of judicial inquisition as to lunacy under two heads : Firstly, that in the presidency-towns of Calcutta, Madras and Bombay and secondly, that outside the presidency-towns. The jurisdiction in lunacy in the former case vests in the High Courts and in the latter it vests in the District Court within whose jurisdiction the alleged lunatic resides. The application may be made by the nearest relative, the Advocate-General or the Government Pleader as the case may be or the public curator or the Collector. Upon the completion of the inquisition, the Court shall determine whether or not the alleged lunatic is of unsound mind and incapable of managing himself and his affairs or may come to a special finding that he is incapable of managing his affairs but capable of managing himself and is not dangerous to himself or to others.
  - (iii) *Custody of lunatics and the management of their property.*—The Court, after determining the question of lunacy, shall make suitable orders and appointments for, if and where necessary, the custody of the lunatic and for the management of the lunatic's property. The Court may define the duties and powers of the manager or guardian and may fix such allowance to him if and as may be deemed fit for his care and pains in the execution of his duties. No manager has, however, the power to dispose of by sale, gift, etc., the property of a lunatic or to grant a lease of such property for more than five years without the express permission of the Court.
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## CHAPTER XII

### CONVERSION AND RECONVERSION

#### Conversion.

If land is directed to be sold and converted into money equity would, on the principle of the maxim, 'Equity looks on that as done which ought to have been done', treat land as turned into money according to the direction though it may not have been so as a matter of fact. Conversely, money would, if so directed, be treated as land. The property thus equitably transmitted by anticipation will possess all the qualities, incidents and peculiarities of that kind of property in which it is directed or destined to be changed.

The equitable doctrine of conversion was well stated by Sir Thomas Sewell, M.R., in the leading case of *Fletcher v. Ashburner*:<sup>1</sup>

"Nothing is better established than this principle, that money directed to be employed in purchase of land, and land directed to be sold and turned into money, or to be considered as that species of property into which they are directed to be converted, and thus, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund or the contracting parties, may make money land or land money."

A testator devises land to a trustee with the direction that the land be sold and the proceeds be kept for the benefit of X. At law whether the property is land or money depends on the actual nature of the particular property and not in any respect on the wishes of its owner. So land remains land until sold and turned into money by the trustee. But in equity the land is to all intents and purposes, regarded, as from the testator's death, *i. e.* when his will becomes operative, as a sum of money.

Conversely, if there is a trust of money for the purchase of land, the money will, from the date the trust becomes operative, be treated, in equity, as land.

The equitable doctrine of conversion as stated by Maitland<sup>2</sup> had "its root in this simple principle that when property has been given to a trustee it must not be in the power of that trustee to alter the devolution of the beneficial interests by committing a breach of trust".

It need be noted that in England there were, till 1925, two different systems of intestate succession—one for realty which devolved upon those called heirs at law, and the other for personalty which was distributed among those called next of kin. The Law of Property Act, 1925, has abolished, in cases of death after 1925, all differences between real and personal estate as regards succession. Consequently, the doctrine of conversion ceases to have its former importance in so far as an intestacy is concerned. But the doctrine continues to retain its importance as regards wills, since a testator often disposes

1. (1779) 1 Brown Ch. 497.

2. Maitland's Equity, 1916 ed., p. 214.

of differently his realty and personality. It has also an important bearing on the question of payment of death duties, the duties on realty and personality not being the same.

The Indian law, including the Indian Succession Act, which is applicable to all except those subject to personal law, never made any distinction between immovable and movable property for the purposes of devolution and the subject has at best only the post 1926 importance of English law.

There are four modes or cases in which there is a notional conversion of one form of property into another :

- (i) *Under a trust, i. e. where the trustees have been directed to sell or purchase land.*—The direction to sell must be imperative : if there was an option, there is no conversion in equity. But where there is imperative trust to convert, then the fact that the trustees have a discretion to postpone conversion or even that they cannot convert without the consent of the life-tenant does not prevent the trust property being converted in equity. With regard to the time from which conversion takes place, the general rule is that it takes place from the time the trust instrument came into operation.
- (ii) *Under a contract i. e. where there is a binding contract for the sale or purchase of land.*—A contract does not, however, operate to convert the property unless it is one of which specific performance would be ordered. Here conversion takes place from the time the contract became effective in equity.

There is, however, a divergence of opinion whether and how far the doctrine of conversion is or should be applicable to those cases where there is no completed contract of sale in existence but the existing contract gives to the other simply the right to purchase. This is of frequent occurrence in case of leases. So where A grants a lease of his house to B with a power or option to B to purchase it and B exercises his option during A's life time there is no difficulty and the doctrine of conversion would apply whether the actual sale is effected before or after A's death. But the question is whether the same rule would apply where the option is not exercisable<sup>3</sup> before or is in fact exercised after the lessor's death. The judicial authorities<sup>4</sup> under English law have consistently ruled that it does although it has been remarked that the extension of the principle to such cases is anomalous and should not be extended further.<sup>5</sup> The view of the leading writers<sup>6</sup> on the subject has been averse to the extension of the doctrine of conversion to such cases.

- (iii) *Partnership land.*—Equity, in the absence of any provision to the contrary in the partnership instrument, regards partnership land as in effect held by the partners on an implied or constructive trust for sale. Partnership land is, therefore, treated as personal and not real estate. Here conversion takes place from the time the land became substantially involved in the partnership business.
- (iv) *Order of the Court.*—An order of the Court rightfully made for the sale or, though so rare, for purchase of land operates as conversion from the date of the order and devolution, etc. to the

3. *Re Issacs*, (1894) 3 Ch. 506.

4. *Lawes v. Bennet*, (1785) 1 Cox 167 ; *Re Corrington*, (1932) 1 Ch. 1 ; *Re Rose*, *Midland Bank Executor and Trustee Co. Ltd. v. Rose*, (1949) Ch. 78.

5. *Edwards v. West*, (1878) 7 Ch. D. 858, 863 ; *Re Dyson*, (1910) 1 Ch. 750.

6. See D. H. G. Hanbury, (1933) 49 L. Q. R. 173 ; *Snell's Principles of Equity*, 24th ed., pp. 240-41.

property would be governed accordingly unless the court rules to the contrary.<sup>7</sup>

### Reconversion

*Reconversion* is that imaginary process by which a prior notional conversion is annulled and the notionally converted property restored in contemplation of equity to its original or actual state. Reconversion may take place either by act of parties or by the operation of law.

A piece of land is devised to A upon trust to sell and pay the proceeds to B. On the testator's death notional conversion takes place and whether the land is actually sold or not, it is treated and comes to B as money. B has a right to say to the trustees, "I prefer the land instead of the purchase money of the land" and if he elects to take the land as land, the property is said to be reconverted from money into land by this election. This is called reconversion by act of the party.

Such an election towards reconversion may be made expressly or through conduct, *e.g.*, taking or retaining as such the property in its unconverted form. The power of reconversion may be exercised by persons who are *sui juris* and competent to deal with property as such. Cases of persons under a disability or with limited interest would be governed by the general law on the subject.<sup>8</sup>

With regard to joint or undivided shares in the converted property reconversion may, of course, take place if all the co-sharers concur in the same. In the absence of unanimity among them the law is that one or more of them can insist on or secure reconversion in case of money,<sup>9</sup> but not in case of land,<sup>10</sup> the reason being that land is diminished in value if not sold in one piece and fragmentation would prejudice the interest of other co-sharers.

Reconversion by operation of law is where the property originally directed to be converted comes into the possession of a person absolutely entitled to dispose it of, and is left by him in its original condition without any declaration of his intention regarding it. Here the money or property is said to be at home. No equity subsists in any one to change the character in which it is found in the owner's hands.

The burden of proof is on the person who contends that a reconversion has taken place.<sup>11</sup>

7. *Att.-Gen. v. Marquis of Ailesbury*, (1877) 12 App. Cas. 672.

8. See p. 172 *infra*.

9. *Seeley v. Jagger*, (1717) P. Wms. 389.

10. *Holloway v. Radcliffe*, (1857) 23 Beav. 163.

11. *Griesbach v. Fremantle*, (1853) 17 Beav. 314, 317.

## CHAPTER XIII

### ELECTION

#### General Principles.

"Election...is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person, from whom he derives one, that he should not enjoy both."<sup>1</sup>

Suppose A, by will or deed, gives to B property belonging to C, and by the same instrument gives other property belonging to himself to C, a court of equity would hold C to be entitled to the gift made to him by A only upon the condition, impliedly imposed upon him, of renouncing his own property in favour of B. He is, therefore, put to his election whether he will take under the instrument, that is, take the property given to him by A and give up his own property for B, or against the instrument, that is, retain his own property and either forfeit the property given to him by A, or take it and make compensation to B for the value of his (C's) own property which he has retained.

"The principle on which the doctrine of election is based", said Chitty, J., in the leading case of *Re Lord Chesham, Cavendish v Dacre*<sup>2</sup>, "is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates..... If a man approbates, his obligation is confined to his adopting the instrument as a whole and abandoning every right inconsistent with it."

It does not appear to be very clear as to whether and how far the doctrine of election was recognized or enforced by the common law Courts. It is, however, recognized that in consequence of the forms of proceedings at common law the party could not be put to elect at law. Story concludes his investigation on the point as follows:—"But, whatever may be the truth of the case as to the recognition of the doctrine of election in Courts of law, it is very certain that it is principally enforced in Courts of equity, where, indeed, the jurisdiction to compel the party to make an election is admitted to be exclusive".<sup>3</sup>

"The doctrine of election is not a positive rule of law; it is merely a right in one party to call upon another to choose between two or more benefits. Until a party is called upon actually to make this choice, there is nothing inequitable in allowing him to enjoy both benefits."

#### Contrast of English and Roman doctrine.

The doctrine of election, like many other doctrines of equity jurisprudence in England, appears<sup>4</sup> to have been derived from the Roman law. There are, however, the following two notable differences<sup>5</sup> between the two with regard to the application or operation of the doctrine:

- (i) Under the Roman law, the doctrine of election applied only in case of testamentary dispositions. Under English law, on the other hand,

1. Story's Equity Jurisprudence, 3rd ed., p. 739.

2. (1886) 31 Ch. D. 466, 473.

3. Story's Equity Jurisprudence, 3rd ed., p. 746.

4. Ibid p. 741.

5. The Principles of Equity by H. A. Smith, 4th ed., p. 482.

the doctrine, though originally confined to testamentary dispositions, applies equally to dispositions by will and dispositions by deed *inter vivos*.

- (ii) No case of election arose in Roman law where a testator made a bequest of property of another person under the erroneous supposition that it belonged to himself. Such a bequest was considered void, and the property so referred to might be retained by the person to whom it belonged while at the same time he received a benefit under the same will. In English equity, however, it is immaterial whether the donor gives property of another intentionally or under the misapprehension that it belonged to himself.

#### **Election—How far based on intention.**

It is necessary to enquire whether and how far the doctrine of election is based on the intention of the testator. While it may be stated in general terms that the doctrine of election is based essentially on the implied or presumed intention of the donor or testator, it need clearly be understood that it is not necessary that the donor or testator must be shown to have intended to put the donee to his election. The relevancy or importance of intention rests : firstly, on the principle or rule of construction that the donor or testator presumably intends that all parts of the instrument should be carried into effect and it is the duty of the beneficiary to give effect to it as far as possible ; and secondly, on the requisite that there must appear on the face of the instrument a clear intention on the part of its author to dispose of that which is not his own, it being immaterial whether he knew it or not.<sup>6</sup>

The underlying principle is clearly illustrated by those cases where the testator purports to give the property of the donee to another without knowing whether it belongs to the donee or not. So if A gives Whiteacre to B and at the same time or as a part of the same transaction makes a gift of Rs. 20,000 to C and though Whiteacre belongs to C it is proved that this was not known to A or that A thought that he himself owned it, C would, nonetheless be put to his election. On the facts of this case, it is clear that A being unaware of the fact that Whiteacre belongs to C could not have intended C to elect but he did intend to transfer Whiteacre to B and must be supposed to have intended that the whole of his instrument should take effect. It would, accordingly, be inequitable for C to receive a benefit from A and at the same time refuse to give effect, wholly or as far as possible, to A's intention as manifested in the instrument. C must, therefore, be put to his election.

#### **Compensation, not forfeiture, the rule.**

The equitable doctrine of election under English law, as stated by Maitland<sup>7</sup> is based not on the principle of forfeiture or confiscation but on the principle of compensation. Stated in other words the aim of equity under the doctrine of election is not forfeiture but compensation.

The beneficiary is free to elect either to take under the instrument or against it. If he elects to conform to the instrument and part with his own property, no question arises. But if he elects against the instrument and the question is how does it affect the provision in his favour *vis à vis* the

6. *Welby v. Welby*, 2 V. & B. 187.

7. Maitland's *Equity*, 1916 ed., p. 226.

disappointed donee in this case. It was formerly held in some cases<sup>8</sup> that by refusing to comply with the donor's expressed intention, a person entirely forfeited the benefit which the donor conditionally bestowed upon him. It was, however, held in *Streatfield v. Streatfield*<sup>9</sup> the forfeiture does not result from such non-compliance and all that is required from the beneficiary is to make or allow compensation to the person who is disappointed by his election. This decision has been consistently followed by a long line of authorities and represents the established English law on the point.

A gives to B a house belonging to C, which is worth Rs. 10,000/- and by the same will he gives to A, a legacy of Rs. 15,000/- of his (A's) own property; and C unwilling to part with his house, elects against the instrument. C will, under these circumstances, retain his house and will also (which would not be possible if forfeiture was the rule) receive Rs. 5,000/- leaving to B Rs. 10,000/- in lieu of the house bequeathed to him from legacy of Rs. 15,000/- in his favour.

It is important to note that the effect of election in such cases is based upon the presumed intention of the donor that the other (disappointed) legatee must benefit to the extent or value of the gift in his favour and must be sharply distinguished from those cases where there is an expressed intention to benefit the other (disappointed) legatee specifically. So if A had given to C Rs. 15,000/- upon the express condition that he should transfer his house to B, C would have taken nothing if he refused to comply with the condition.

#### Conditions to be satisfied.

The two conditions necessary to raise election may be stated in the words of Strahan as follows:

- “(i) That the property given to the donee is property of which the donor, and
  - (ii) That the property of the donee given to the third person is property of which the donee,
- “were entitled freely to dispose.”<sup>10</sup>

It is thus necessary that the gift in both these respects must be of free disposable property. Because if the donor was not competent to dispose of his property, the donee does not get anything in lieu of which he should transfer his property to the third person or from which he should, in case he elects against the instrument, recompense that third person. In the same way if the donee is not competent to transfer his property to the third person, there is nothing to elect and he must take the benefit without being required—and, in fact, being unable—to carry out the intention of the donor by giving his own property. Thus where property was given to a married woman without power of anticipation,<sup>11</sup> and some free property of hers was given away by the instrument, she did not have to elect, but was allowed to keep her own property and also to take the gift for it, *i. e.* the former had been made inalienable.

It is similarly necessary that the donee should not otherwise be entitled to the property that he gets from the donor. Thus if A has a special power to appoint £ 10,000 among his children who are to take in default of appointment,

8. *Cowper v. Scott*, 3 P. Wms. 124 ; *Cookes v. Hellier*, 1 Ves. 235.

9. (1735) Cas. Talb. 176.

10. Strahan's Digest of Equity, 3rd. ed., p. 29.

11. *Re Vardon's Trusts*, (1885) 31 Ch. D. 275. It may, however, be noted that after the Law Reform (Married Women and Tortfeasors) Act, 1935, a restraint on anticipation annexed to a gift to a married woman would be ineffective and the example would not hold good.

and he appoints £ 9,000 among the children and £ 1,000 to B who is a stranger the children will be under no obligation to elect between taking £ 9,000 and transferring £ 1,000 to B and repudiating the appointment altogether.

#### No election if two distinct gifts.

The doctrine of election does not apply where a testator makes two or more separate devises or bequests of his own property in the same instrument. So if, of the two distinct gifts, one is onerous and the other beneficial, the donee is not required to elect whether he will accept both or neither. He may, if he likes, accept the benefit and reject the burden. But if two such properties are included in one gift, as where an onerous lease of a house is given with the contents of the house, the beneficiary must take whole gift or none of it, unless there is an intention to allow him to take one without the other. On a similar principle where a person takes a benefit in one capacity and asserts his right in another, no question of election arises.

#### Election not applicable to debts.

The doctrine of election only applies in case of a bounty and does not extend to the case of creditors. If, therefore, there is a devise to creditors for the payment of their debt, they can accept the benefit of it without prejudice to their legal rights. It must, however, be noted that a legacy in satisfaction of a statute barred debt is mere bounty and is, therefore, subject to the doctrine of election.

#### Mode of election.

Election may be made expressly or it may be inferred from conduct. It must, however, be kept in view that there can be no election except by a party who knows the nature and extent of his rights and with that knowledge determines to elect.

Special rules apply to cases of election by persons under disability. In case of an infant there are two courses. The election may be deferred until the infant comes of age and becomes competent to elect. The other course is that an enquiry may be directed as to what is most beneficial to the infant, and the court elects upon the result of that enquiry. The procedure is more or less the same as in case of lunatics. A married woman of full age can now elect like any male adult.

An election made is binding on the legal representatives of the donee. If, however, a party bound to elect dies without having elected and both the benefits given to him and the property of his which is given away, devolve on the same person, that person can elect. If they devolve upon several persons in the same proportions, *e. g.* to four next-of-kins, each can elect according to his interest.

If they devolve upon different persons, there can be no election.<sup>12</sup> So where A transfers B's house worth £ 1,000 to C and gives a legacy of £ 2,000 to B and B dies without having made the election leaving X, entitled to all his realty, and Y, entitled to all his personality, there is no question of election. X gets the house and Y gets the legacy of £ 2,000 subject to the right of C of compensation of £ 1,000 the value of the house sought to be given to him.

With regard to the time within which an election must be made the law is that election must be made within the time, if any, limited under the instru-

12. *Re Macartney*, (1918) 1 Ch 300.



ment or on its absence within a reasonable time, otherwise the election would be supposed to have been made against the instrument.

### Indian Law.

In India the equitable doctrine of election has been given effect to through Section 3 of the Transfer of Property Act, 1882 and Sections 180—190 of the Indian Succession Act, 1925, the former of which is applicable to cases of disposition by deed *inter vivos* and the latter applies to testamentary dispositions. While the details must be left for study from or in connection with these Acts it may be pointed out that the provisions of those Acts are almost identical to those of English law except the following notable differences between the two :—

- (i) Unlike the English law as explained above, the doctrine of election in India, under both the Acts referred to above, aims at or results in the principle or rule of forfeiture or confiscation and not on that of compensation. This may be explained by means of the illustration added to Section 35 of the Transfer of Property Act, 1882 which is as follows :

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

The gift so released goes back to the donor or his legal representatives. In case, however, of a will and in case of gift where the donor dies before the election is made, the donor's representatives must, on the facts of the above illustration, out of Rs. 1,000 pay Rs. 800 to B.

- (ii) There is no fixed period, in England, within which election must be made. But in India both these Acts provide that if the donee does not elect within one year after the transfer becomes effective, the donor's representatives shall require him to make his election and if he does not comply with such requisition within a reasonable time thereafter, he shall be deemed to have elected to confirm the will.

It is important to note that doctrine of election as laid down under these Acts applies to Hindus<sup>13</sup> as well as Mohammedans.<sup>14</sup>

Academically a somewhat questionable extension of the doctrine of election or of the principle that a person cannot approbate or reprobate the same transaction was made by the Supreme Court in *Baipathuma v. Shankara Narayana*<sup>15</sup>, on the following facts.

Usufructory mortgage first created on 18-4-1942 was affirmed in a subsequent documents executed on 26-4-1962 providing 40 years from the date of its execution for the enjoyment of the mortgage, K, a minor with 1/4 share was not a party, to the 1862 document. K's transferee resisted the suit filed on 20-4-1944 for redemption as to his share on the ground of limitation of 60 years reckoned from 1942. It was held that having taken the benefit of and as such approbated the terms of 1862 document, neither H nor his

13. *Mangaldas v. Ranchhordas*, (1890) 14 Bom. 438.

14. *Sidik Husain v Hashim*, 43 I. A. 212.

15. A. I. R. 1965 S.C. 241.

successor could reprobate it and this case was concluded by the doctrine of election.

Obviously the question of election would arise only where the legatee derives some benefit from the will to which he would not otherwise be entitled. An unusual illustration of this proposition is afforded by the case : *Valliamai Achi v. Nagappa Chettiar*.<sup>16</sup> So where by a will, the father forming joint Hindu family with his son (adopted or left by will the residue of the properties described by him as self-acquired but being in fact joint-family property to the son who obtained the probate and acted accordingly, the son could not be held to have.

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16. *Valliamai Achi v. Nagappa Chettiar*, A. I. R. 1957 S. C. 1153.

## CHAPTER XIV

### PERFORMANCE, SATISFACTION AND ADEMPITION

#### *The Doctrine of Performance*

Performance is a presumption of equity by which the acts or omissions of a covenantor which virtually cause the covenantor to be placed in the same position as if the obligation had been performed, are construed to be a performance of the obligation, either completely or *pro tanto*.

A very clear description of the doctrine of performance may be had through the following words of Pomeroy :

“When a person has definitely bound himself to do a certain act, by which a particular kind of thing will be bestowed upon another in a specified manner, and *instead* thereof bestows the same kind of thing upon the obligee in a different manner, or else permits the same kind of thing to devolve upon the obligee in the course and by operation of law, so that what is thus done or permitted may amount to a complete or partial fulfilment of the existing obligation, then the party will be presumed to have done or permitted this with the intention of performing the very obligation itself in whole or in part, and the obligation will be thus wholly or partially performed, as the case may be”.<sup>1</sup>

#### **Performance of a covenant through purchase.**

The doctrine may be illustrated through the case of *Wilcocks v. Wilcocks*.<sup>2</sup> There A, in consideration of his marriage, covenanted to purchase and settle lands of the value of £ 200 a year on his wife and the first and other sons of the marriage in tale. He did purchase lands of that value but never settled them on the wife and children and died intestate. A's eldest son X, succeeded as heir to the lands purchased. X brought an action to have the covenant to purchase and settle lands enforced against his father's personal representatives. It was held that the lands purchased by A which descended to X must constitute performance of the covenant.

#### **Performance of a covenant through intestacy.**

The other class of cases showing the application of the doctrine of performance (and covered by the enunciation of the doctrine by Pomeroy noted above) may be represented through the case of *Blandy v. Widmore*.<sup>3</sup> There A covenanted before his marriage to leave X, his intended wife, £ 620. The marriage took place and the husband died intestate. X became entitled under the Statute of Distribution to a moiety amounting to more than £ 620 of her husband's property. It was held that X could not claim £ 620 under the covenant because her intestate portion of more than £ 620 from A's estate must be deemed to be a performance of the covenant.

The reasoning behind this construction may be well advanced in the following words of Dr. Hanbury :

“X was morally entitled to certain money, but A, in order to carry out the letter of his obligation, would have to make a will. Now it is a

1. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 2, p. 583.

2. (1706) 2 Vern. 558.

3. (1716) 1 P. Wms. 323.

matter of common knowledge that many men.....are extraordinarily unwilling to make a will and postpone sometimes till too late, this distasteful duty. A may, nay probably did, say to himself, "Why go to the trouble and expense of making a will when I can carry out my obligation to X (which is all I care about) as well, or better, by simply dying intestate?"<sup>4</sup>

It is important to note that if the husband in a case like the above, covenants to pay money *in his life time*, the widow's distributive share cannot be held to be a performance of the obligation and she is entitled to both. It is so because the equity of performance is based on the intention of the covenantor and in this case there is a clear lapse rather than intention of performance. There would be a breach of the covenant on the death of the husband and the covenanted sum would accrue to her as a debt.<sup>5</sup>

In order to understand the application and the limitations of the doctrine of performance it is essential to bear in mind the fact that it is not an arbitrary rule but a sound doctrine based on the presumed intention of the covenantor and if his words, conduct or other circumstances negative such a presumption, the doctrine will not be applied.

Accordingly, property of a different nature from that covenanted to be purchased by the covenantor would not be available as a performance. So where the covenant is to purchase freehold lands, it is not performed by the purchase of lease holds or copyholds.<sup>6</sup> But a purchase of lands of the kind to be settled, though smaller in value, will be treated as *pro tanto* performance or a satisfaction of the covenant.

### SATISFACTION AND ADEMPTION

#### Satisfaction.

Satisfaction, in its general sense, may be defined as a presumption of equity by which a donation is construed to be intended to be in substitution for of a *prior obligation or intended gift*.

Thus A is indebted to B for a sum of Rs. 5000/-. A executes a will and therein makes a provision for payment of Rs. 6,000/- to B. The legacy will be presumed, unless the contrary intention is established, to have been intended and as such operate as a satisfaction of the debt.

A, by his will gives Rs. 5000/- to B. Subsequently, A gives Rs. 6,000/- to B. A dies without revoking the will. In the absence of anything to lead to the contrary intention it will be presumed that the gift of Rs. 6,000/- was in substitution of the legacy and hence B cannot claim under the will.

#### Distinction between Satisfaction and Performance.

In early cases the terms are used interchangeably and it appears that Story in common with equally eminent equity practitioners failed to observe strictly the distinction between satisfaction and performance. There is, however, a fundamental distinction between the two. The best exposition of the distinction is contained in the judgment of Sir Thomas Plumer in *Goldsmid v. Goldsmid*.<sup>7</sup> They have been distinguished as follows :—

(i) The question whether a bond or covenant has been performed

4. Modern Equity by H. G. Hanbury, 2nd ed., p. 389.

5. Oliver v. Brickland, (1732) 3 Atk 420n.

6. Lechmere v. Lady Lechmere, (1733) 3 P. Wms. 211.

7. (1818) 1 Swans. 211, 219.

depends<sup>8</sup> not upon the intention of the obligor or covenantor but upon whether that has been done which was agreed to be done. But the question, whether a gift by will is a satisfaction of an obligation depends upon the intention of the obligor.

- (ii) In satisfaction, the thing done is something different from the thing agreed to be done whereas in performance the identical act which the party contracted to do is considered to have been done.
- (iii) In performance the obligee has no choice whereas in case of satisfaction the obligee has a choice either to accept the gift in satisfaction of the obligation or to decline the gift and retain his original right.

#### General heads of satisfaction.

The equitable doctrine of satisfaction, considered *in all its aspects*, arises in four general classes of cases :

- (i) Satisfaction of debts by legacies ; (ii) Satisfaction of legacies by subsequent gifts ; (iii) Satisfaction of portion debts by legacies or portions ; (iv) Satisfaction of legacies by portions or advancements.

The term 'satisfaction' as so far used or explained includes also what is called 'ademption', and it is in this sense that Pomeroy defines satisfaction as follows :

"Satisfaction may be defined, in a general manner, to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken either wholly or in part in extinguishment, by way of substitution, of some prior claim in favour of the donee."<sup>9</sup>

#### Distinction between satisfaction and ademption.

Before pursuing the topic further, it would be better to distinguish satisfaction in its narrower sense (*i. e.* exclusive of or in contradistinction to that called ademption) from ademption. In many judicial opinions, and by several text writers the words "satisfaction" and "ademption" are regarded as absolutely synonymous, and are used interchangeably. There is, however, a plain and necessary distinction between the two—a distinction which is recognized and has been expressly pointed out and explained by many judges, and text writers. Satisfaction and ademption may be distinguished as follows :

- (a) Satisfaction is a general term and ademption is only a particular form of it. As stated by Pomeroy, "In the sense in which the terms are now used, every ademption of a prior gift is a satisfaction, but every satisfaction is not an ademption."<sup>10</sup>
- (b) Satisfaction presupposes an obligation and the subsequent transfer is intended to satisfy the existing obligation. In ademption, on the other hand, there is no obligation as such but merely a gift or bounty and the subsequent act or transfer is in substitution for or in annulment of the earlier bounty.
- (c) As such, "ademption.....depends solely upon the testator's own intention, wholly without reference to any consent or other

8. Ashburner's Principle of Equity, 2nd ed., p. 482 ; see Sn 11's Principle of Equity, 20th ed., p. 212 for contra.

9. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 2, p. 487.

10. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 2, p. 595.  
See also Ashburner's Principles of Equity. 2nd ed., p. 586.

act of the donee; an ademption operates, if at all, entirely independently of the donee's assent, and even against his will.<sup>11</sup> But it is not so in case of satisfaction, and no transfer can operate as satisfaction without the consent of the donee.

- (d) Accordingly or to put it differently, since the former legacy creates no right in the legatee, he has no claim for an election on his part between that and the subsequent transfer. In satisfaction, on the other hand, the donee in the subsequent transfer had a right against the donor and has, therefore, a choice either to insist on the fulfilment of the existing obligation without accepting the benefit under the subsequent transfer or accept the latter in satisfaction or discharge of the former.
- (e) The presumption in favour of ademption is stronger than the presumption in favour of satisfaction

Taking satisfaction in the restricted sense of the four general classes of cases, only the first and the third are, strictly speaking, cases of satisfaction, while the second<sup>12</sup> and fourth<sup>13</sup> are cases of ademption.

Perhaps the only attempt to define satisfaction and ademption in contrast to each other has been made by Strahan in his 'Digest of Equity'<sup>14</sup>. It would be useful to reproduce here the author's definitions together with the examples added to illustrate or emphasize the distinction :

"Satisfaction means a transfer of property which, if the donee accepts it, operates in law as a complete or *pro tanto* discharge of a previous legal liability of the donor.

"Ademption means a transfer of property which, whether the donee wishes it or not, operates in law as a complete or *pro tanto* substitution for a gift previously made by the donor's will, and unrevoked at his death.

"A covenants on the marriage of his son X to give him £10,000. By his will A leaves to X one-third part of his residuary estate. This is a *satisfaction* of A's liability under the covenant if X accepts it. But X is under no obligation to accept the share of the residue as a discharge of A's estate. He can insist on receiving out of such estate the £10,000, the amount A covenanted to pay him.

"A, by his will, leaves his daughter Y one-third of his residuary estate. Subsequently, on Y's marriage, he gives her £10,000. A dies without having altered or revoked his will. The £10,000 is an *ademption*, complete or *pro tanto*, of the gift of one-third of A's residuary estate. Y has no option in the matter."

The four general classes enumerated before may now be taken up for consideration :—

- (i) **Satisfaction of debts by legacies.**—It was established by the beginning of the eighteenth century that, where a testator gives to a creditor a legacy equal to or greater than his debt, the legacy is a satisfaction of the debt<sup>15</sup>. Ever since its enunciation the sound-

11. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 2, pp. 491-492.

12. Ashburner's Principles of Equity, 2nd ed., p. 484.

Strahan's Digest of Equity, 5th ed., p. 272.

13. Maitland's Equity, 1916 ed., p. 187.

Strahan's Digest of Equity, 5th ed., p. 277.

14. Strahan's Digest of Equity, 5th ed., pp. 265-266.

15. Talbot v. Duke of Shrewsbury, (1774) Pr. Ch. 394.

ness of this rule has been constantly challenged. Lord King said :<sup>16</sup>

“Though it is true a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, where it is the same sum or more than he owes him, yet why may he not be both just and bountiful, when there are assets to answer both ?”

On account of the disapproval of the general rule, the Courts have been very ready to find in the will an indication that the debt is not to be satisfied by the legacy. Consequently, the scope of the rule has been appreciably narrowed. The authorities lead to the following conclusions by way of limitation upon the operation of the general rule in favour of satisfaction :

The presumption of satisfaction being based on the intention of the testator, there would be no satisfaction in cases where the will and the accompanying circumstances do not lead to any such inference as to the testator's intention. Thus there will be no satisfaction in the following cases :—

- (a) where there is express direction in the will for the payments of debts ;
- (b) where the debt is incurred on or after the date of the will which would obviously negative any intention of the legacy being in satisfaction of the debt ;
- (c) where the legacy is less than the debt, it will not be a satisfaction even *pro tanto* ;
- (d) where the legacy is not in every way as beneficial as the debt. So a debt will not be satisfied even by a legacy of a larger amount if the legacy is uncertain, e. g. share of a residue, and the debt certain, or if the legacy is contingent and the debt vested or if the legacy is deferred and the debt immediate.

A number of exceptions have accordingly been imposed on the generality of the rule and its scope has thus become considerably reduced. Subject to such exceptions, however, the rule still prevails though it seems a little difficult to agree with the observation of Romer, J. that it “is just as strong now as it always has been”.<sup>17</sup>

It is on account of the wide range of these exceptions that Maitland observes that “On the whole it is not very often that a debt, not being a portion debt, is satisfied by a legacy.”<sup>18</sup>

Section 177 of the Indian Succession Act, 1925, lays down that “Where the debtor bequeaths a legacy to his creditor, and it does not appear from the will that legacy is a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.”

In so far as the presumption of satisfaction is concerned this section is a departure from the English rule,<sup>19</sup> but, as the law has come down to, there may not be any material difference in effect between the two.

- (ii) **Satisfaction of legacies by subsequent gifts.**—Where a legacy appears on the face of a will to be bequeathed for a particular purpose (not being a portion within the next clause or head) and a subsequent gift appears to have been made for the same

16. Crompton v. Sale, (1729) 1 Eq. Abr. 205.

17. Re Stibbe, (1946) 175 L. T. 198.

18. Maitland's Equity, 1916 ed., p. 182.

19. Hassonally Moledina v. Popatlal Prabhudas, 37 Bom. 211.

purpose, a *prima facie* presumption arises that the second gift was intended to redeem the legacy either completely or in part.

Thus in *Re Corbett, Corbett v. Lord Cobham*,<sup>20</sup> a testator left £10,000 to the trustees of "the endowment fund of C hospital". Subsequently, he wrote to the trustees saying that he wished to redeem a promise to give £10,000 to the endowment fund of C hospital and sent a cheque for this amount. It was held that the gift being for a particular purpose and that purpose being the same as that for which the legacy was given, it, in the absence of anything to the contrary, adeemed such legacy.

A similar question of satisfaction<sup>21</sup> arises where one legacy to a person is followed by another legacy to the same person. The question here is whether the two legacies were intended to be cumulative or substitutional.

According to Strahan<sup>22</sup> it is, strictly speaking, altogether incorrect to talk of ademption in such cases. Both these transfers become operative on the death of the testator and the only question arising in such cases is whether or not the testator was in both cases referring to the same legacy or different legacies. It will be presumed that he was referring merely to the same legacy if the two legacies are of equal amount and given to the same person, and by the same will or same codicil or if by separate instruments, they are, in addition, expressed to be given from the same motive.

Section 101 of the Indian Succession Act, 1925 lays down the rules of construction (in the absence of any indication in the will) with regard to the cumulative or substitutive effect of two bequests to the same person. The provisions are analogous to those under English law.

(iii) Satisfaction of portion debts by legacies or portions, etc.

(iv) Satisfaction of legacies by portions or advancements.

These two classes of cases correspond<sup>23</sup> to the first two just considered above with the only difference that the legacy or gift in these two classes are of a special nature called, 'portions'. The treatment of these topics may, therefore, be completed merely by considering what 'portion' means and how it differs from ordinary gifts and what difference does it make or introduce in the law relating to satisfaction or ademption considered above.

A father, according to the language of the early judges, owes to debt of nature by his children. The debt lies in the father's obligation to make what is called a provision for the child in order to give a start to or establish the child in life. The father usually discharges this obligation by, for example, a marriage settlement, payments for putting a son into business or profession, buying for him the goodwill or stock-in-trade of a business. Such a provision by the father for the child is called a 'portion'.

So by 'portion', in the words of Strahan<sup>24</sup> "is meant a gift made by a father.....to or for the benefit of a lawful child for the purpose of discharging the moral obligation of the father to provide for the child."

It need be noted that it is not every gift or provision made by a parent for the benefit of his child, that is, a portion. A portion, as stated by Maitland,<sup>25</sup> implies something that, having regard to the circumstances of the parties, may

20. (1903) 2 Ch. 326.

21. Snell's Principles of Equity, 20th ed., p. 214.

Pomeroy's Equity Jurisprudence, 5th ed., Vol. 2, p. 515 et seq.

22. Strahan's Digest of Equity, 5th ed., p. 273.

23. (i) Corresponding with (ii) and (iii) with (iv).

24. Strahan's Digest of Equity, 5th ed., p. 274.

25. Maitland's Equity, 1911 ed., p. 188.



be called a substantial portion. Sums given to the child for the payment of his debts and small gifts made to a child from time to time without a specific purpose, are, therefore, not to be regarded as portions, but rather as temporary assistance, unless it appears that the father intended them to be regarded as 'portions'. On the other hand, the term 'portion' does not imply that there is a solemn marriage settlement, or the purchase of a business or an estate; any considerable gift of money might be regarded as a portion.

The presumptions or rules with regard to a 'portion', both as to its meaning and effect, are not limited to the natural relationship of a parent and child but cover or extend equally to cases where the donor stands in *loco parentis* to the donee. The question whether A stands in *loco parentis* to B so that a gift by A to B is *prima facie* a portion, depends upon A's intention. If A intends to assume towards B the parental duty of providing for a child, A stands in *loco parentis* to B. A's intention may be proved by his declarations, by his conduct, or by the nature and terms of the gifts in respect of which the question arises. If A has so acted towards B as to impose upon himself a moral obligation to provide for B, that is a strong, though not conclusive, evidence that he has assumed the character of a parent; and A's conduct may show an intention for this purpose to stand in *loco parentis* to B, although A has undertaken some, and not all, of the parental duties. If, on the other hand, the child has a father with whom it resides and by whom it is maintained, it would afford some inference against the quasi parental relation. It is, of course, easier to establish such a relationship where there is some bond of consanguinity or affinity between the two persons. But this in itself is neither essential nor can be sufficient. There is, in the absence of further evidence, no presumption as such between a grandfather and a grandchild, or a mother and child. The doctrine does not ordinarily apply between a putative father and illegitimate child; or husband and wife or brother and sister.

Portions given to a child during his father's life are called advancements.

Portion need be distinguished from portion debts. The former involves merely a natural or moral debt, but the latter involves or is a conversion of the former into a legal obligation or liability. Maitland describes<sup>26</sup> portion debt as a debt incurred by a father or mother by way of making provision for a child of his or hers, or a debt incurred by some person who stands in *loco parentis* to another in favour of that other. A, when his daughter marries, covenants with the trustees of her settlement that he will pay them £ 5,000. Here A becomes a debtor and is under an obligation to pay £ 5,000 which is after the covenant a portion debt. The child has, in such cases, the rights of an ordinary creditor.

The essential or material difference between the former two and the latter two classes come to this:

(a) The gift in the former is made by way of bounty while the gift in the latter is made in pursuance of "the debt of nature".

(b) The debt in the former has been incurred in lieu of money or some other benefit derived by the debtor or donor. The debt in the latter, on the other hand, is in lieu of money or some other provision which the debtor or donor has taken upon himself to give to another in discharge of a moral obligation.

The peculiarity of or the additional factor in the debt being a portion debt or the bounty being a portion, which aids the presumption of satisfaction and ademption in these cases lies in the principle that equity leans against double

26. Maitland's Equity, 1916 ed. p. 184.

portions and as such there can be no presumption that the parent or quasi-parent wishes to provide for the child twice over. If, therefore, on two occasions he appears to have made provision for the payment of his so-called debt, the Court presumes that the latter provision was intended to be taken in satisfaction of the earlier one.

The presumption against double portions "was originally intended to prevent the duplication of charges on lands ; and it was only applied in favour of an heir-at-law as against younger sons or daughters. It has in later times been treated merely as an illustration of the maxim that equality is equity, and as designed to prevent one child from obtaining a larger share of his parent's property than his brothers and sisters. The existence of the presumption against double portions has been regretted from early times—by Lord Thurlow, because it often defeated the intention of the testators, and by Lord Eldon, because it gave a preference to bastards (or strangers) over legitimate children. It is, however, firmly settled although modern judges have often expressed an unwillingness to extend it."<sup>27</sup>

The question then comes to this : what is the effect of a portion upon or what difference does it make in the law or rules on satisfaction and ademption as considered or stated before ? The following points need be noted in answer to this question :—

(1) It is clearly established that the presumption of satisfaction and ademption is easier and would be stronger in case of portion debts or portions.

(2) It is equally well established that if the benefit given by the will be less than the portion debt, then there is here—what there is not in the case of an ordinary debt—a presumption of satisfaction *pro tanto*.

(3) The leaning against double portions has been allowed a great scope in case of ademption and it was at one time thought that a smaller subsequent advancement totally, and not only partially, adeems a prior legacy of larger amount ; the reasoning advanced being that in such cases the testator must be intended to make a provision only to the extent of smaller amount. But in *Pym v. Lockyer*,<sup>28</sup> it was finally laid down that a smaller portion will be deemed an ademption of a larger legacy *pro tanto*, but *pro tanto* only.

(4) It is also established that the two provisions, as stated by Ashburner,<sup>29</sup> "must be of substantially the same character", or as indicated by Maitland<sup>30</sup> "should be of somewhat the same character" and that small<sup>31</sup> or slight<sup>32</sup> differences will not exclude the presumption of satisfaction.

It is, however, not possible to say how far this rule goes ahead of those cases which do not involve portions. It may suffice to state on the point the law as stated by Strahan :

"The differences which will rebut the presumption that a second portion was intended to satisfy or adeem a previous portion must be such as to make it either (i) a gift of a different thing ; (ii) a gift to substantially different persons ; or (iii) a gift subject to substantially different conditions. It should be noted that smaller differences will suffice to rebut the presumption of satisfaction than are necessary to rebut the presumption of ademption.

27. Ashburner's Principles of Equity, 2nd ed., p. 485.

28. (1840) 5 My. & Cr. 29.

29. Ashburner's Principles of Equity, 2nd ed., p. 488.

30. Maitland's Equity, 1916 ed., p. 186.

31. Snell's Principles of Equity, 20th ed., p. 219.

32. Strahan's Digest of Equity, 5th ed., pp. 280-281.

In India, section 178 of the Indian Succession Act, 1925, abolishes the doctrine of satisfaction of portion (debt) by legacy. It states that where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Under section 179 of the Indian Succession Act, 1925, no bequest shall be wholly or partially adeemed by a subsequent provision by settlement or otherwise for the legatee.

#### **Admission of parol evidence.**

Where any question of performance, satisfaction or ademption arises, the Court will, as to the admission of parol evidence, proceed upon the following rules :—

(1) If the Court holds either on account of an express declaration of the donor to that effect or because such a declaration is implied from the construction of the instrument that the second transaction was not a performance, satisfaction or ademption of the earlier liability or gift, it will not admit parol evidence of the donor's actual intention.

(2) If the Court, from a consideration or comparison of the two instruments, raises a presumption that the second transaction was intended as a performance, satisfaction or ademption of the earlier liability or gift, it will admit all relevant parol evidence of the donor's actual intention to rebut or support such presumption.

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## CHAPTER XV

### ADMINISTRATION OF ASSETS

When a person dies his estate vests in his heirs or executors (if any, appointed by the deceased to carry out his directions and to distribute his properties) or administrators (appointed by the competent Court, in the absence of and for the function of an executor) and in either case three distinct duties are imposed on such heir, executor or administrator : (1) collection of the assets of the deceased ; (2) payment of all his debts and liabilities ; and (3) distribution of the surplus of those beneficially entitled to it. These duties are collectively known as "administration of the assets". The position of an executor is the same as that of an administrator.

In England, the Courts of Equity exercised concurrent jurisdiction in this sphere with the common law Courts and the Ecclesiastical Courts. In the nineteenth century, ecclesiastical jurisdiction in this matter became obsolete. The common law Courts, in the exercise of this jurisdiction, failed because of the inadequacy, of their machinery for taking accounts and for administrative work in general. Their procedure was too rigid for them to be capable of viewing the question of administration as a whole. It is, therefore, from the practice of the Court of Chancery that the greater part of the law of the administration of assets has grown up in England.

Under common law only the chattels of the deceased were available for the payment of the debts due to him and such properties were called the legal assets of the deceased. At common law the executor had a complete power over the legal assets. A sole executor or each of the several executors could give a good discharge for a debt due to the testator and a sale, mortgage or pledge by him of any part of the assets vested the legal title in the purchaser, mortgagee or pledgee. He could also, at common law give away without consideration, any part of the assets or release a debt due to the deceased and the donee or the debtor was safe, at common law, from any claim of the creditors or legatees.

In equity, the reality of the deceased was also available for the payment of debts if so charged or devised to trustees upon trust to pay his debts. Such properties were called the equitable assets of the deceased. As a general rule, equity followed the law with regard to the powers of the executors. It, however, modified the legal powers of the executors in three ways :—

- (i) If a purchaser from an executor had notice that the sale was not required in the administration of assets, equity would not allow him to retain the property, whether he acquired the legal or equitable title. Similarly, payment to the executor otherwise proper did not discharge the debt if he had notice that the executor was about to misapply the money.
- (ii) If an executor gave away part of the assets or released a debt without consideration, the gift or release had no effect in equity as against the creditors of the testator or parties interested in the residue.
- (iii) Where an equitable claim arose from acts of one executor done against the will or without the knowledge of his co-executor, equity sometimes refused to enforce the claim.

The English law on the subject was very complicated particularly due to the distinction made in this regard between personality and reality or legal assets and equitable assets but the law has become very much simplified by and under the Administration of Estates Act, 1925 which has, as far as possible, assimilated reality and personality for the purposes of the administration of assets.

In India, the law with regard to the administration of the assets of a deceased person has been laid down in the Indian Succession Act, 1925 which, with certain reservations, applies also to the Hindus and Mohammedans, etc.

Based on the English law but much simpler in form, the Act lays down in Part IX covering sections 217 to 369 the law in India with regard to Probate, Letters of Administration and the Administration of the Assets of the deceased. The main provisions of the Act on the subject relate to : (i) the jurisdiction of the Courts, the procedure and the conditions for the grant of the probate or letters of administration ; (ii) the powers, duties and liabilities of an executor or administrator ; and (iii) the distribution of legacies.

An adequate treatment of the subject in reference to the various provisions of the Indian Succession Act would not, it appears, be appropriate for this book and may better be left for a treatise on the Indian Succession Act.

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## CHAPTER XVI

### MISTAKE, MISREPRESENTATION, FRAUD AND UNDUE INFLUENCE

**Introductory.**—Questions of mistake and misrepresentation, etc. frequently arise and are important in relation to contracts and transfers or unilateral dispositions of property. The nature and scope of the investigation may be presented in reference to contracts.

One of the cardinal rules or essentials for the formation of a contract valid in or enforceable at law is that the mind of the parties must be one, *i. e.* both must meet. In other words, there must be consent and that consent must be free. As defined by Section 13 of the India Contract Act, 1872 two or more persons are said to consent when they agree on the same thing in the same sense. The contract may be vitiated or become defective in different ways or on various grounds. It may be that a party supposed to have agreed was mentally incapable of doing so or though under no such mental incapacity his consent was not free. It may be that either or both of the parties gave his or their consent under a mis conception regarding the facts surrounding or the legal rights and obligations arising out of the agreement or transaction in question. Such a misconception may be on account of or without any imposition by the other party.

The question which arises for consideration in such cases is what is the effect of these facts or circumstances on the rights and obligations of the parties to the transaction and what are the reliefs available to them in these cases. These cases have been generally classified and considered under four heads, *i. e.* mistake, misrepresentation, fraud and undue influence which were recognized and remedied both by common law and equity. Equity, in these cases, had, therefore, mostly only a concurrent jurisdiction. In certain cases or for certain purposes, however, the jurisdiction of equity was exclusive. There were, for example, cases which were not fraud in view of a Court of law or for the purposes of a legal relief but were held to be fraud in equity or for the purposes of an equitable relief. The equitable reliefs available in these cases are rectification, rescission and cancellation which fall and would be considered under equitable or specific reliefs. It would be appropriate here to consider the elements of mistake and misrepresentation, *etc.* and the requisites for relief in such cases.

Mistake may arise in any one of the following three ways :

- (i) One of the parties may be directly led into a mistake by an act or omission of the other party ;
- (ii) One of the parties may be mistaken apart from any consideration of the conduct of the other ;
- (iii) Both the parties may be mistaken.

The latter two classes are cases of mistakes pure and simple and there is, in them, no element of fraud. On the other hand, the first, *i. e.* mistake introduced by one of the parties amounts to and is called misrepresentation which may be innocent or fraudulent.

There are, besides but similar to fraudulent misrepresentation, other artifices which one person may make use of for the purpose of deceiving or interfering with the right of another. Such cases fall within the term or

definition of fraud or, to be more precise, actual fraud. But besides this there are cases wherein there is no element of actual fraud or deliberate deception, but the circumstances are such that equity treats them as tainted with fraud and such cases are, to distinguish them from actual fraud, called constructive fraud.

It is, further, possible that a person entering into or effecting a legal transaction has not done so under or on account of mistake, misrepresentation or fraud but he is at the moment under an incapacity for entering into any legal transaction or relationship owing to age, insanity or intoxication, *etc.*, and as such incapable of giving his consent. Then a person may be legally competent to give his consent but the consent is not free and valid if it has been given or obtained by coercion or undue influence. In these cases also the parties are entitled to reliefs similar to those referred to above. The doctrine of undue influence is a creature of equity and is as such of wider importance than other cases of mental incompetency of similar import.

### MISTAKE

It is generally recognized that it is neither possible nor advisable to attempt a definition of mistake; the reasons advanced being that the meaning of the term is sufficiently clear, that it is impossible to foresee or provide for the infinite variety of forms which it may assume in the course of business and it is impossible to frame a formula which will generalise the legal concept or effects of mistake. It may, nonetheless, be useful to reproduce here the definition of mistake by Story.<sup>1</sup>

In distinguishing it from accident he defines mistake as "some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence". This definition as commented upon by Smith,<sup>2</sup> fails to mark clearly the distinction recognized between mistake, pure and simple, and fraud.

Mistakes are ordinarily divided into two sorts :

- (i) Mistake of law, and
- (ii) mistake of fact.

As a general rule, subject to most important qualifications or limitations, it may be stated or accepted that no relief is available in case of a mistake of law. On the other hand, the general rule in the case of a mistake of fact is that an act done, or contract made under a mistake of fact is voidable and relievable in equity. The distinction is based on the principle embodied in the familiar maxim 'ignorance of law is no excuse'.

The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried. If, upon the mere ground of ignorance of the law men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature of difficulty of law is, therefore, treated, as a culpable negligence which cannot be excused or remedied. On the other hand, no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge, and therefore, an ignorance of facts

1. Story's Equity Jurisprudence, 3rd ed., p. 63.

2. The Principles of Equity by Smith, 4th ed., p. 216.

does not import culpable negligence and is relievable. It is, however, not always easy to say whether a mistake is one of law or one of fact. The decisions as to mistake are not very clear nor very easy to reconcile, and it is admitted by almost all the textwriters on the subject that in the present state of the law it is not practicable to present in a definite form the doctrine respecting the effect of mistake or to clear the subject from some obscurities and uncertainties which surround it.

### Mistake of law.

The general rule being as stated above, let us now consider the limitations within which the rule is operative. This need be considered under two heads : (A) What is the sense in which the term 'law' must be understood for the purposes of this rule ; (B) What are special circumstances under which, though the mistake alleged is undoubtedly one of law, it is deemed both reasonable and equitable to grant relief against it.

(A<sub>1</sub>) Law, here, means the law of the land. Foreign law is a question of fact and no one is presumed to know the law of a foreign country.

(A<sub>2</sub>) It is in the next place confined to public statutes and the rule does not apply to private Acts of Parliament which are treated as mistakes of fact.

(A<sub>3</sub>) The term 'law' is, further, to be understood in the sense of denoting general law, the ordinary law of the country and cannot be extended to cover questions of private rights which are treated as one of fact.<sup>3</sup>

(B) Referring to the rule against relief in a case of a mistake of law, Mellish, L. J., observed<sup>4</sup> : "I think there is no doubt that the rule of law is in itself an equitable and just rule which is not interfered with by courts of Equity ; but, on the other hand, I think that, no doubt as was observed by Lord Turner<sup>5</sup>, "this court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes of fact....., that is to say, if there is any equitable ground which makes it under the particular facts of the case inequitable that the....." contract should be allowed to stand or benefit either party.

Story has summarized exceptions to the rule, *i. e.* no relief in cases of a mistake of law—in the following words :

"It is relaxed in cases where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law and in case of imposition, misrepresentation, undue influence, misplaced confidence and surprise."<sup>5a</sup>

(B<sub>1</sub>) (1) *Fundamental mistake*.—If both the parties to an agreement had been labouring under a false impression as to a matter of law, the effect of which would be to make the agreement something entirely different from that which they intended, there could not be any contract at all. The question, in such cases, is not whether a mistake of law will avoid a contract but whether there ever was a contract. The parties would, accordingly, be relieved in cases of such contracts. Thus where both the parties in clear ignorance of the provisions of Section 60 of the Transfer of Property Act, entered into the contract giving the simple mortgagee a power of sale without the intervention of the court, it was held<sup>6</sup> that the material term to the contract being invalid

3. Cooper v. Phibbs. L. R. 2. H. L. 149, 170.

4. Rogers v. Ingham, (1876) 3 Ch. D. 351, 357.

5. Stone v. Godfrey, (1854) 5 D. M. & G. 90.

5a. Story's Equity Jurisprudence, 3rd ed., p. 62.

6. Nawab Begam v. A. H. Creet, (1905) 2 A. L. J. 405.



and unenforceable, it would not be equitable to enforce the contract to execute the mortgage in question.

(B<sub>2</sub>) *Payments by mistake to an officer of the Court.*—Where money has been paid in mistake of law to one of the officers of the Court, such as, a trustee in bankruptcy or a receiver, the Court would order its repayment. The rule was thus stated by Kakewitch, J., in *Re Opera Limited*.<sup>7</sup> :

“If the assets in the hands of an officer of the Court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then notwithstanding that such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officers to recognize the rules of honesty as between man and man and to act accordingly.”

(B<sub>3</sub>) *Surprise, imposition or fraud.*—There are cases in which a formal and solemn act performed in ignorance of a legal right has been reversed on the ground of mere surprise, for instance, where a woman who was entitled to elect, decided hastily in ignorance of her right to account.<sup>8</sup> Similarly, if the eldest son of an intestate agrees in ignorance of his sole right of heirship, to divide the estate with a younger brother, a Court of equity would relieve upon the presumption of some imposition practised.<sup>9</sup>

(B<sub>4</sub>) *Matters of doubtful construction.*—The general rule that ignorance of law is no excuse and cannot be relieved against has no application where the alleged mistake is not that of a well-known rule of law but that of matter of law arising upon a doubtful construction of an instrument.

It must, however, be noted that where in such circumstances a compromise has been entered into, it will not be afterwards disturbed especially where such compromise is in the nature of a family arrangement. The Court will hold the parties to their agreement, even though they may have greatly mistaken their rights and whether the doubtful point was a matter of fact or of law and even where there was no doubtful point at all. The principle was thus stated by Lord St. Leonards in *Westby v. Westby*<sup>10</sup> :

“Where doubts and disputes have arisen with regard to the rights of different members of the same family and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court : *albeit*, perhaps resting on grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers.”

In *Pullaiah v. Narsingham*,<sup>11</sup> the Supreme Court summarised the law on the point as follows :

“Briefly stated, though conflict of legal claims *in praesenti* or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even *bona fide* disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family enter into such a family arrangement. If such an arrangement is entered into *bona fide* and the terms thereof are fair in the circumstances

7. (1891) 2 Ch. 154.

8. *Pusey v. Desbouvrie*, 3 P. Will. 315.

9. *Lansdowne v. Lansdowne*, (1730) 2 Jac. & W. 205.

10. 2 Dr. & W. 503.

11. A. I. R. 1966 S. C. 1836, 1841.

of a particular case, the Court will move readily assent to such an arrangement than to avoid it."

But even in these cases it is essential that it must have been entered into without concealment or imposition on either side.

It is important to note further what Romily, M. R., said in *Lawton v. Campion*<sup>12</sup> :

"The validity of a compromise or family arrangement of disputed rights depends on facts existing at the time, and will not be affected by subsequent judicial determinations, showing the rights of parties to be different from what was supposed or that one party had nothing to give up." The law on the point is the same in India."<sup>13</sup>

It may be observed that the above cases in which relief is given do not, strictly speaking, amount to exceptions to the general rule, since in all of them the relief is grounded, not on the mere fact that there has been a mistake, but some other fact which is, independently of that, efficacious to call further the remedial power of equity.

#### Mistake of fact.

The enquiry as to the effects of mistakes of fact is even more complicated and difficult. The law on the point has been generalised by Story<sup>14</sup> in the following terms :

".....mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a *material ingredient* in the contract of the parties, and disappoints their intention by a mutual error ; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying down no foundation for equitable interference."

Mistakes of fact are generally classified under two categories : (1) fundamental mistake of fact, and (2) incidental mistake of fact.

(1) The law with regard to a fundamental mistake of fact is pretty clear. Contract requires consensual agreement and, therefore, if there is some error on one or both sides with regard to a matter of fact essential to the agreement, the minds of the parties could not obviously meet on the same thing in the same sense and as such no contract could be formed. Such mistakes of fact are, therefore, relievable in equity.

By fundamental mistakes we, accordingly, mean such mistakes which have the effect of preventing any contract being formed at all. Such a mistake may be with regard to—

- (i) the subject-matter of the contract : If Blackacre and Whiteacre are being sold at the same auction and A, intending to buy Blackacre, by mistake bids for and has knocked down to him Whiteacre, this is a fundamental mistake as to the subject-matter of the transaction and there could be no agreement between the parties at all. The parties may be mistaken as "to the existence

12. (1854) 18 Beav. 87.

13. Poonamal v. R. Srinivasarangan, A. I. R. 1956 S. C. 162, 165 quoting with approval the above from the English case.

14. Story's Equity Jurisprudence, 3rd ed., p. 90.

of some fact or facts forming an essential and integral element of the subject-matter."<sup>15</sup> The illustrative case on the point is *Sheikh Bros. Ltd. v. Ochener*<sup>16</sup> decided by the Privy Council. In this case the appellant company, the lessor of a forest in Kenya granted a licence to the respondent to cut, process and manufacture all sisal growing in the forest. The respondent in return undertook to manufacture and deliver to the appellant 50 tons of sisal fibre per month. It was found later on that the leaf potential of the sisal area was not sufficient to permit the manufacture the stipulated quantity. The respondent was sued for the breach. The agreement was held to be void. The court observed that, "having regard to the nature of the contract, which was a kind of joint adventure, it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence, and the mistake was as to a matter of fact essential to the agreement." Similar is the nature and effect of those agreements where the subject-matter within the contemplation of the parties was not at all in existence at the time of the agreement, e. g. where the sale was of a house which had at or before the transaction been swept away by a flood. In such cases there is no agreement at all and the parties would be relieved from the obligations supposed to have been imposed upon them ; or

- (ii) the nature of the transaction itself or the legal relationship intended through the agreement : Thus, if A, in what appears to be the sale of his house for Rs. 1,000, wrote to B to sell the house though he only meant to mortgage the house for that sum, there would be no agreement between A and B because A intended only to mortgage the house while B intended to purchase it. If X similarly executes a deed or signs an instrument, the incidents or consequences would be the same ; or
- (iii) the identity of the other party to the agreement : Thus A, a notorious money-lender, enters under an assumed name into a contract of loan with B. If B had known the identity of A he would never have contracted with him. There is thus no agreement between A and B. Such mistakes are almost necessarily unilateral and cannot, further, be fundamental in all cases, since in many transactions the personalities of the parties are immaterial ; for instance, where a person sells goods for ready money, or a railway traveller takes a ticket.

It must be noted that it is not in every case of a mistake of a fundamental fact that the relief will be available in equity. The mistake may be mutual or unilateral. If the mistake is mutual and fundamental the parties are entitled to relief.<sup>17</sup> If the mistake is unilateral it will afford a ground of relief only in those cases where it operates as a surprise, misrepresentation or fraud upon the ignorant party. It need be noticed that the ground of relief in such cases is not the mistake or ignorance of material fact alone, but the unconscientious advantage involved in the transaction which does not, strictly speaking, fall within the scope of this head. The mistake must not, however, be only on account of negligence on the part of the mistaken party. If the mistake could,

15. See Halbury's Laws of England, 2nd Ed., Vol. 23, pp. 135, 136.

16. (1957) A. C. 136 (P. C.).

17. *Solle v. Butcher*, (1950) 1. K. B. 671.

by reasonable diligence, be discovered, equity will not give any relief for to do so would be to encourage culpable negligence.

2. If, on the other hand, the mistake is incidental and the act or contract is not materially affected by such a mistake of fact, the parties are bound by the agreement and no relief would be available except in cases of extreme hardship involved in the enforcement of such an act or agreement. Mistakes not falling within the scope and definition of fundamental mistakes are treated as incidental mistakes.

#### **Mistakes of expression.**

Cases of mistakes discussed above need be clearly distinguished from those where there is no mistake whatsoever in so far as the agreement itself is concerned but the mistake is confined only to the expression of such agreements. Whenever an agreement or a voluntary disposition of property is sought to be embodied in a formal instrument and the instrument so framed does not conform to the agreement or the intention of the parties, the relief of rectification, as considered later is available to the parties and the deed or instrument is rectified so as to make it conform to the actual intention or agreement of the parties. In such cases the relief is in furtherance of and not against the instrument or the agreement.

In India the main provisions of law with regard to mistakes in contracts are Sections 20, 21 and 22 of the Indian Contract Act, 1872.

#### **Section 20 enacts.**

“Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.”

#### **Section 21 enacts.**

“A contract is not voidable because it was caused by a mistake as to any law in force but a mistake as to a law not in force has the same effect as a matter of fact.”

It need be noted that the words “In British India” after the words “law in force” were removed from this section by the Adaptations of Laws Order, 1950. It is submitted that the section as it now stands does not connote clearly the exact scope of the section. The expression “law in force” is capable of including even a foreign law which could not be the intention of the framers of the amendment nor indeed can that meaning be given to that expression. It would certainly have been better if only the term ‘British’ had been omitted from the section.

#### **Section 22 enacts.**

“A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.”

The legal position in India on these points is not so simple or plain as might appear at first sight. The language of these sections represents or lays down only the general doctrines which as stated earlier, cannot be accepted without a large number of qualifications. In applying and interpreting these sections Indian Courts have made use of and followed<sup>18</sup> English authorities on these points and, broadly speaking, it may be said that on the whole the position in India is almost the same as that under English Law.

Leaving the discussion at the appropriate length for a later stage it may here be mentioned that mistakes vitiating or avoiding contracts or dispositions of properties are provided for under the Specific Relief Act, 1877, which entitles

18. Ram Chandra v. Ganesh Chandra, (1917) 21 C. W. N. 404.

the parties, under the requisite conditions, (a) to resist an action for specific performance of a contract ; (b) to seek rescission ; (c) rectification ; or (d) cancellation.

### MISREPRESENTATION

Misrepresentation has been a very old head of equity under its concurrent jurisdiction. Though not anywhere defined as such it is, in its widest sense, understood to be a mistake on the part of one of the parties to a transaction caused or induced by the acts or omissions of the other. Misrepresentation in this sense has been generally classified under two heads :

- (i) Fraudulent misrepresentation, and
- (ii) innocent misrepresentation.

The essential mark of distinction between the two is that in the former the person making or causing the misrepresentation knows it to be false or does not, though conscious of it, know whether it is true or false while in the latter the person making or causing the misrepresentation knows and honestly believes it to be true though actually it is not so. In the former the representation is either deliberate or reckless and, therefore, there is, as a matter of fact or in the eye of law, an intention to deceive and, as such, it falls and would be taken up under fraud. Innocent misrepresentation, if it induced a contract, provides a defence to an action on the ground of breach of contract, and will enable the misled party to get the contract rescinded if the parties can be put back again in their original position. The difference on the point between common law and equity is that at law there is no relief in case of innocent misrepresentation unless it goes to the whole substance of the contract but in equity a contract may be rescinded on the ground of innocent misrepresentation although the misrepresentation is as to a collateral matter.

In India, misrepresentation [which renders the contract voidable under Section 19], as defined under Section 18 of the Indian Contract Act, 1872 means and includes :

- “(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true ;
- “(2) Any breach of duty without an intent to deceive, gains an advantage to the person committing it ; or any one claiming under him, by misleading another to his prejudice or the prejudice of any one claiming under him ;
- “(3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.”

Misrepresentation should be facts material to the contract. Mere commendatory expressions generally used by business community about their goods are not sufficient to avoid the contract. A mere expression of opinion cannot be regarded as a misrepresentation of facts even if the opinion turns out to be wrong.

### FRAUD

Equity exercised a general jurisdiction in case of fraud sometimes concurrent with and sometimes exclusive of the common law Courts.

Fraud has been classified under two heads : (1) actual fraud and (2) constructive fraud.

*Actual fraud* consists of fraudulent misrepresentation which may be made

through either positive assertions (*suggestio falsi*) or concealment (*suppressio veri*).

There are certain circumstances wherein a person is under a duty to disclose a material fact and in such cases non-disclosure has the same effect as a positive representation of its non-existence. Where there is no duty to disclose a fact, the mere failure to reveal it is no ground for fraud. In general, there is no duty upon a party to a contract to make a disclosure to the other side, *e. g.* in contract for sale of goods, the maxim is *caveat emptor* and it rests upon him who alleges and relies upon such a duty to show that it exists. The conspicuous examples of the existence of such a duty are contracts of insurance and suretyship.

As pointed out in *Derry v. Peek*,<sup>19</sup> actual fraud is essentially a common law tort of deceit and its essentials are :

- (i) False representation of an existing fact ;
- (ii) with the intention that the other party should act upon it ;
- (iii) the other party did act upon it ;
- (iv) and thereby suffered damage.

Misrepresentation, it need be noted, may be made by words—spoken or written—or by acts or by manoeuvres. In *Walter v. Morgan*,<sup>20</sup> Campbell, C. J., said, “A single word, or (I may add) a nod or a wink or a shake of the head or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for specific performance of the agreement.”

Mere silence is not fraud, but in certain circumstances, *e. g.* where there is duty to speak or where silence is deceptive, it would amount to fraud. In fraud by silence, if the plaintiff had means to discover the truth by ordinary diligence, he cannot obtain rescission. But in any other case the fraudulent party could not say that the other could have discovered the truth. In *R. C. Thakkar v. Gujarat Housing Board*,<sup>21</sup> false estimates of the costs of construction were given in a tender. The contractor agreed to some reduction on the belief that the estimate was correct. The court held that the representation contained in the tender to be fraudulent. The defence that the plaintiff would have discovered the true costs by reasonable efforts, was held to be bad.

Actual fraud was a ground for relief both at law and in equity. At law there were two forms of relief—an action for damages on deceit and the action of rescission but the latter became obsolete as a legal relief since a Court of law had no machinery for taking the account which was a necessary condition of rescission. In equity the party deceived could either resist a suit for specific performance or bring an action of rescission.

*Constructive fraud*.—Such acts or contracts as, though not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, yet by their tendency to deceive or mislead, or violate public or private confidence or to injure the public interests, are equally reprehensible with positive fraud and, therefore, equally prohibited. Constructive fraud has generally been classified under three heads which are, however, not mutually exclusive :

19. (1889) 14 A. C. 337.

20. (1861) 2 Cox. 369.

21. A. I. R. 1973 Guj. 34.

- (1) Transactions contrary to the policy of the law, *e. g.* a contract to reward a third person for bringing about a marriage or a contract in restraint of trade or marriage or for suppression of criminal proceedings which are void.
- (2) Transactions which are an abuse of some fiduciary relationship, *e. g.* contracts or conveyances conferring benefits by children on their parent or by wards on their guardians or by clients on their solicitors, etc. which are voidable and liable to be set aside unless entered into with scrupulous good faith. These cases are generally treated under the separate head of undue influence which is, indeed, only an aspect of fraud.
- (3) Transactions which operate substantially as a fraud upon the rights and interests of third parties, *e. g.* contracts or bargains with the poor and ignorant without independent advice, or with reversioners or expectant heirs, which are liable to be set aside in equity unless the other party satisfies the onus on him to show that the transaction is fair and reasonable. Other illustrations of cases falling within this category are conveyances with a view to defraud creditors or a private agreement made between a compounding debtor and one of his creditors which are void.

### UNDUE INFLUENCE

The three personal grounds on which the common law granted relief in case of an otherwise lawful agreement were fraud, coercion and incapacity. Equity invented a fourth. Without holding that there was actual fraud or coercion or that the person agreeing was mentally incapable of doing so, it held that a person might enter into an agreement under a combination of circumstances so akin to the three legal grounds as to make it inequitable to hold him by it. This is what is meant by the equitable doctrine of undue influence.

Equity went further. Not merely did it hold that an agreement induced by undue influence was voidable, but that when an agreement was between persons occupying certain relative positions, it must be presumed to have been induced by undue influence till the contrary was shown by the person capable of exercising influence by positive proof of facts such as exercise of free or independent will, competent advice or adequate consideration.

Under influence is only an aspect of fraud and is largely covered under constructive fraud. It may be defined as any influence, pressure or domination in such circumstances that the person acting under that influence may be held not to have exercised his free and independent volition in regard to the act. Such an influence may be either actual or presumed from the position or relationship of the parties. Cases in which a presumption of undue influence arises may, generally speaking, be classified under two heads :

1. Parental relation or relation analogous to parental relations : parent and child ; guardian and ward ; trustee and beneficiary, etc.

There is, it need be noted, no such presumption of undue influence as between husband and wife the reason, in the words of Farwell, L. J., being : "Upon principle, it is clear that business could not go if for every transaction by way of gift by a wife to her husband the onus were on the husband to show that the wife had independent advice ; such a position would render married life intolerable."<sup>22</sup> The presumption, however, does apply to transfers from

22. *Howes v. Bishop*, (1909) 2 K. B. 390, 402.

an intended wife to an intended husband since, as Waugham, J., observed, the former would during that stage sign almost anything the latter puts before her.<sup>23</sup>

2. Business relation :—Solicitor and client ; doctor and patient ; principal and agent, etc.

In India fraud and undue influence [which render a contract voidable under Section 19] have been defined under Sections 17 and 16, respectively of the Indian Contract Act 1872 in the following terms :

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract :—

- (1) the suggestion as a fact, of that which is not true by one who does not it to be true ;
- (2) the active concealment of a fact by one having knowledge or belief of the fact ;
- (3) a promise made without intention of performing it ;
- (4) any other act fitted to deceive ;
- (5) any such act or omission as the law specially declares to be fraudulent.

*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that, regard being had to them it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.”

“(1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over another.

“(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

“(3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.”

In *Subhash Chandra v. Ganga Prasad*,<sup>23a</sup> the Supreme Court analysed the principles and authorities on undue influence and it would be instructive to remember the following features of the doctrine as made out by the decision in this case.

(1) There are three stages for consideration in a case of undue influence. In the first place the relations between the parties must be such that one is in a position to dominate the will of the other. Once that position is substantiated

23. *Re. Loyd's Bank*, (1931) 1 Ch. 289, 302.

23a. A. I. R. 1967 S. C. 878.



the second stage has been reached namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges which that of *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

(2) Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?

(3) It must be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. It is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Upto that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of law, "undue".

(4) There is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during donor's illness and a few days before his death. Generally speaking, the relation of solicitor and client, trustee and *cestui que trust*, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises.

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## CHAPTER XVII

### ACCIDENT

Accident is also a head of equitable jurisdiction which was concurrent with that of the Courts of law. In equity, "accident" means some unforeseen and undesigned event, productive of disadvantage and not due to negligence or misconduct on the part of the person seeking relief. The cases in which equity may, under certain conditions, give relief on account of accident are :

1. **Lost or destroyed documents**—*e. g.* bonds, title deeds, negotiable instruments, etc. The equitable intervention in such cases was with a view to protect the rights of the parties on account of the loss and destruction and consequential non-production of these documents as evidence of their title or right to any property or claim. To enable any one to come into equity for relief in such cases, it was necessary to show some special inconvenience from the loss, such as, a desire to be established in possession of the property or the undue peril to which the loss exposed the plaintiff in the future assertion of his rights. In India, Section 65 (c) of the Indian Evidence Act, 1872, allows secondary evidence where the document is lost or destroyed otherwise than through the default or negligence of the party in question. Order 7, Rule 16 of the Code of Civil Procedure, 1908, grants relief and lays down the procedure for suits on lost negotiable instruments.

2. **Imperfect execution of powers**.—As stated earlier,<sup>1</sup> courts of equity did not interfere in case of or execute mere power unless it was in the nature of a trust. In case, however, where the donee has shown his willingness to execute a mere power but by reason of accident, there is a defective execution of the power, equity will grant relief in certain cases.

So if A transfers certain properties to B with a power of appointment to be exercised by means of a deed and B exercises that power in favour of X and Y but through a will and not a deed, equity may make the exercise of power effective by treating it as proper execution.

It need be noted that only such defects will be aided and relieved of in equity which are not of the very essence and substance of the power. No relief will accordingly be granted where the exercise of the power required the consent of certain persons and the power was executed without such consent.

It need further be noted that this relief is available only in favour of certain persons, namely, creditors, wives, children, charities and purchasers, etc. and not in favour of husbands, illegitimate children, remote relations and volunteers, etc. The basis of this distinction is that in the former class of cases there is either a valuable consideration or an element of moral obligation in favour of the bounty and as such equity would intervene towards the fulfilment of that obligation ; whereas it is not so in the latter.

3. **Erroneous payments**.—In case of the administration of estates it is possible that the executor or the administrator pays off a debt or legacy upon a belief that the assets are sufficient for all purposes but it turns that an unknown debt or claim comes to light or there is some description in the value of the assets. Equity granted relief in such cases. In India, this is provided

1. See p. 74, *supra*.

for by Section 359 of the Indian Succession Act, 1925. Similarly, an executor will not be liable where without his fault the goods of the testator are stolen ; or the goods of a perishable nature depreciate.

It must be added that in matters of positive contract equity does not give any relief. An accident which prevents a party from fulfilling his contract is no ground for the interference of equity. Thus if a lessee covenants to pay rent or repair the premises, he will be bound, both at law and in equity, to perform his covenants notwithstanding the destruction of premises by fire or earthquake since parties, in such cases, contemplate and provide for or must be presumed to have contracted subject to these contingencies or risks. Section 13 of the Specific Relief Act, 1877, is based on this principle.

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## CHAPTER XVIII

### SET-OFF

Lord Mansfield has expressed his view on the subject of set-off in equity in the following language :

“Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater ; and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately, in separate actions.”<sup>1</sup>

At common law, the only defences open to the claim of a plaintiff were either that his claim never existed or that it had ceased to exist. It did not avail a defendant at law to allege that, though the plaintiff had a valid claim and though the defendant had no answer to that claim yet the defendant had a claim against the plaintiff and that the amount which he would recover under that claim if prosecuted to judgment, would reduce or extinguish or overlap the amount of the plaintiff's claim.

Until the reign of Queen Anne no set-off of one debt against another was allowed at law, except where the debts were mutually connected debts. If, therefore, A owed B £ 100 for goods sold and delivered, and B owed A the same sum on a promissory note, and B brought his action against A to recover the price of the goods, A could not plead as a defence that B owed him £ 100 on promissory note, but his only remedy was by a separate and cross-action.

The natural sense of Englishmen was first shocked at this in the case of bankrupts ; and a right of set-off in bankruptcy was conferred in the year 1705.<sup>2</sup> The next step was taken by the legislature in the reign of George II, when the “Statutes of Set-off” was passed. It provided that in all cases of mutual debts a right of set-off exists, although neither of the parties was bankrupt. It did not apply to goods or other specific things wrongfully detained.

The principle in equity was different.<sup>3</sup> Equity demanded that the defendant should be allowed to resist a claim against him on the ground that he had a counteravailing claim against the plaintiff. It would be conducive to the ends of justice that both claims should be adjudicated upon in the same proceeding so that multiplicity of suits may be avoided. Accordingly the plaintiff, in order to entitle him to the investigation or enforcement of his right must, as a condition, be prepared to meet or allow the claims, if any, of the defendant together with his own.

Snell has expressed the view that it is not at all clear whether any right of set-off apart from the statutes of set-off, was recognized in equity.<sup>4</sup> Story, however, maintains<sup>5</sup> that the Courts of equity had and exercised such a jurisdiction independently of the Statutes of Set-Off and that eventually they did extend the doctrine of set-off and claims in the nature of set-off beyond the

1. *Green v. Farmer*, 4 Burr. 2220, 2221.

2. 4 & 5 Anne, c. 4 continued by 5 Geo. 2, c. 30.

3. *Ashburner's Principles of Equity*, 2nd ed., p. 493.

4. *Snell's Principles of Equity*, 20th. ed., p. 512.

5. *Story's Equity Jurisprudence*, 3rd ed., pp. 602-606.

law. Story's view may be supported by the following observations in *Ex parte Blagden*<sup>6</sup> :

"There is a difference upon set-off in equity and at law. In equity it prevailed long before the statute."

The Statutes of Set-Off have been repealed and the present practice as to set-off is governed by O. XIX, r. 3 of the Rules of the Supreme Court which provides that the defendant may set-off or set up by way of counter-claim any right or claim whether it sounds in damages or not. But to prevent injustice, it is provided that the Court may order separate trials if convinced that the plaintiff's and defendant's claims cannot be conveniently disposed of in one action. There is now no difference between set-off at law and set-off in equity.

The following points of importance on set-off need be specified :—

- (a) A set-off is only available where the claim is enforceable by an action ; it will not, for instance, be available when the recovery of the debt has become barred by statute.
- (b) No set-off is allowed unless the claims exist between the same parties and in the same right ; it will not, for instance, be available where the debt is due to A and B jointly and the action is by A in his own or exclusive right or where the action is by A in his personal capacity and the debt due to him is as an executor.
- (c) A debt of which defendant is only an assignee may be set-off.<sup>a</sup>
- (d) Set-off is not allowed if the equity of third persons would be prejudiced, it will not, for instance, be available where the claim sought, to be set-off has been assigned to third persons *bona fide* and for consideration.

In India, the distinction between a legal set-off and an equitable set-off continues to subsist. The provisions as to legal set-off in India are contained in O. 8, r. 6 of the Code of Civil Procedure 1908. The requisites are :

- (i) the claim to set-off must be an ascertained sum of money ;
- (ii) it must be legally recoverable by the defendant from the plaintiff ;
- (iii) it must not exceed the pecuniary limits of the jurisdiction of the Court ;
- (iv) both parties must fill the same character as they fill in the plaintiff's suit.

One of the essentials for a set-off under the Statutes of Set-Off in England was that the claim in set-off must be for a liquidated sum. Similarly, the first requisite for set-off under O 8, r. 6 is that the claim to set-off must be an ascertained sum of money which does not mean a sum admitted by the plaintiff. The expression 'ascertained sum' is used in contradistinction to unliquidated damages :

A, a clerk, sues B, his employer for arrears of wages due to him. B alleges that A left his employment without notice and that A is, therefore, liable to pay damages which he claims as set-off. The amount not being ascertained cannot be set-off.

6. 1 Ves. 465.

<sup>a</sup> See *Bennett v. White* (1902) 2 K B 643.

Courts of equity in England did not confine themselves within the limits of the common law Courts as to legal set-off, and allowed a set-off beyond the limits of the legal rule of special circumstances where there was some equitable ground for protecting the defendant. Accordingly, where the cross-demand arose out of the *same transaction* or were so connected in their nature or circumstances that they could be looked upon as part of one transaction, it was considered inequitable to drive the defendant to separate cross-suit and he was allowed to plead a set-off *though the amount was unascertained*. Such a set-off is called an equitable set-off.

Order 8, r. 6, as explained above, is restricted to a legal set-off for it requires that the amount to be set-off shall be an ascertained sum. The question, therefore, arises whether an equitable set-off may be pleaded in an Indian Court. The point arose in *Clerk v. Ruthnavaloo*,<sup>7</sup> which is the leading authority on the subject and it was held that such a set off may be pleaded in exercise of the general right of the defendant. It was observed :—

“These (referring to the relevant provisions of the Civil Procedure Code), however, are provisions of a Code regulating procedure only, and, whilst, we think that the language used has no effect of enlarging the right of set-off, we ought at the same time to say that according to our present opinion, the Civil Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit.”<sup>8</sup>

So, if a washerman sues his employer for his wages, the employer may set off the value of articles not returned to him against the wages.

The claim to equitable set-off cannot, on the other hand, be allowed if the cross-demands do not arise out of the same,<sup>9</sup> but relate to different transaction.<sup>10</sup>

Order 20, rule 19 (3) of the Code of Civil Procedure, 1908, recognizes an equitable set-off. It runs as follows :—

“The provisions of this rule (relating to a decree for set-off and an appeal therefrom) shall apply whether the set-off is admissible under rule 6 of Order VIII or *otherwise*.”

7. (1865) 2 Mad. H. C. R. 296.

8. (1865) 2 Mad. H. C. R. at p. 303.

9. Bupendra Narain v. Bahadur Singh, A. I. R. 1953 S.C. 201, where the zamindar's claim to set-off of the amount due as rent, revenue and cess was not allowed as against the claim or suit by the tenant for mesne profits for the period of trespass or unauthorized possession of the land on the ground (a) that the two did not form part of the same transaction; and (b) that claim by way of set-off related to a subsequent period. The first ground, it is submitted, appears to be doubtful and the decision may be placed on second ground alone together with the plea of uncertainty as to the claim of set-off being barred by lapse of time.

10. Ram Deo v. Pokhram, I. L. R. (1894) 21 Cal. 419.

## CHAPTER XIX

### INTRODUCTORY

#### Importance of Trust.

Trust has been rightly acclaimed by various writers of eminence on the subject as the highest achievement of equity in England and it would be useful to note some of these opinions.

Maitland says<sup>1</sup> :

“Of all the exploits of Equity, the largest and the most important is the invention and development of Trust. It is an ‘Institute’ of great elasticity and generality ; as elastic, as general, as contract. This perhaps forms the most distinctive achievement of English Lawyers. It seems to us almost essential to civilization, and there is nothing quite like it in foreign law.”

According to Story also “trusts constitute a very important and comprehensive branch of equity jurisprudence.....(Trusts have) been applied to a great variety of cases, which never could have been in the contemplation of those who originally introduced them ; but which, nevertheless, are the natural attendants upon a refined and cultivated state of society, where wealth is widely diffused, and the necessities and conveniences of families, of commerce, and even of the ordinary business of human life, require that trusts should be established.....to exigencies of times to come.”<sup>2</sup>

In the words of Dr. Hanbury<sup>3</sup>, “trust is the very centre and kernel of equity”. Dr. Allen’s estimate of equity in general and trust in particular is equally as also justly lofty. He says, “In England equity has had a social as well as a juristic value. Its greatest invention, the trust, has been, in Maitland’s phrase, ‘a most powerful instrument of social experimentation’. For the valiant part which it has played in matters of such high social importance as these, our debt to equity is great and our acknowledgment should be unstinted.”<sup>4</sup>

Trust, originating in and as developed by the Court of Chancery in England has now become immensely popular and useful in, among other countries, India and its importance in the legal, commercial, social and religious life of today need not be further emphasised.

#### Nature of trust.

As stated earlier trusts or what earlier fell within the term ‘uses’ were not recognised by and could not be enforced through the common law Courts and if A transferred properties to B for the use of or in trust for X, A became the legal owner of such property absolutely and could, therefore, lawfully ignore altogether the object of the transfer or X’s interest in the property which thus depended for its enforcement purely on the pleasure of B or moral and social sanction. B, however, came within the province of equity. He had accepted an obligation, a confidence and was in conscience bound to fulfil it and it was the concern of the Court of Chancery to see that he discharged that obligation

1. Maitland’s Equity, 1916 ed., p. 23.

2. Story’s Equity Jurisprudence, 3rd ed., pp. 394, 396.

3. Modern Equity by H. G. Hanbury, 2nd ed, p. 19.

4. Law In The Making by C. K. Allen, 1946 ed., p. 339.

in favour of X. But how could the Chancery consistently with its maxim that 'Equity follows the law' do it? There was only one practical solution and that was adopted. Equity followed the law and thus recognised B's legal title in the property; it did not disturb it, it did not oust B from it but added that the legal ownership of the property is subject to an obligation and cannot be dissociated from it. B was bound in conscience and therefore, in equity to carry it out. So if B in reliance upon his legal title in any way or to any extent ignored, prejudiced or damaged X's interest in the property he was on the pain of imprisonment precluded from touching X's interest in the property and constrained to make good any loss occasioned by or through him. In this way equity extracted from B's legal ownership of the property, its beneficial enjoyment and reserved it for X or those entitled to it in equity or what may otherwise be stated, equity gave the kernel to X and allowed the husk to remain with B and thus converted B's moral obligation into an equitable obligation. An equitable right or estate in the property became vested in X and could, within the be limitations recognized or retained by Equity, be enforced through the Court of Chancery.

Professor Keaton has rightly spoken about the nature of trust in the following words, "A trust..... is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestui qui trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust."

So by trust we are to understand an equitable obligation which is annexed to the legal ownership of property and arises when and wherever the beneficial interest in the property is dissociated from the legal title. It arises from a confidence reposed in or to be imposed upon the holder of the legal title.

### ORIGIN AND DEVELOPMENT OF TRUST UNDER ENGLISH LAW

The origin and development of trust in England has been characteristically summed up in the following terms :

"The parents of trusts were Fraud and Fear, and a Court of Conscience was the Nurse."<sup>5</sup>

Before developing the central idea to its structural form, it is desirable to refer briefly to a small controversy regarding the origin of trust under English Law.

Maitland maintains<sup>6</sup> that trust did not come to England "as a foreign thing" and that there is nothing "Roman about it". Story, on the other hand, expressed the view that "It is in the highest degree probable, that those trusts, which are exclusively cognizable in Courts of equity, were, in their origin, derived from the Roman law, being very similar, in their nature, to the *fidei commissum* of that law."

The position as summed up by Pomeroy is as follows :

"The elementary notion of trusts, like so many other doctrines of equity, was borrowed from the Roman law..... Although it is plain that the conception of a "use" was borrowed from this *fidei commissum* of the Roman law, and that the English Chancellor followed in the footsteps of the Roman Magistrate, yet

5. Att-Gen. v Sands, (1669) 2 Freem 129.

6. Maitland's Equity, 1916 ed., p. 6.

7. Story's Equity Jurisprudence, 3rd ed., p. 394.



beyond this mere elementary notion or suggestion there is little resemblance between the two species of ownership. These essential differences are as marked as their superficial similarity ; and it is a grave error to represent the entire equity jurisprudence concerning uses and trusts as derived from the Roman law."<sup>8</sup>

### Trusts in the Roman Law.

Partly from rules of the ancient law, and partly from prohibitory statutes, the Roman citizen was much restricted with respect to the persons whom he might appoint as his testamentary heir. He could not give his inheritance to an alien or *peregrinus*, nor to a person prescribed, nor to a posthumous child not belonging to his own family nor, with certain exceptions, to a woman.

"To evade these restrictions, the method was contrived, during the latter period of the Republic, of appointing a qualified person as heir, upon whom the inheritance would devolve according to legal rules, and of accompanying the appointment by a direction or request that this heir would, as soon as he obtained the inheritance, transfer it to another specified person who was the real object of the testator's bounty, and who, although prohibited from being made heir, was not prohibited from receiving a transfer of property from a living person by way of a gift. At first, the fulfilment of the testator's direction was left wholly to the heir's sense of honour, but in process of time the claim of the beneficiary was recognised and enforced by a magistrate.

"The inheritance thus given to the appointed heir, in trust for another person, was termed a *fidei-commissum*, the heir or trustee the *fiduciarius* and the beneficiary the *fidei commissarius*."<sup>9</sup>

The following points may be noted by way of comparison between the *fidei commissa* of the Roman law and the uses and trusts of English law :—

1. Both were designed to evade the law.
2. Both were, at first, left for their fulfilment to the heir's or trustee's sense of honour, but in process of time became recognized and enforceable by a magistrate or the Chancellor.
3. In uses and trusts there are of necessity two distinct estates, the legal and the equitable, vested in two different persons, and these must continue as long as the trust relation exists. In the Roman law there was no such division of ownership, no double simultaneous estates.

## EVOLUTION OF TRUST UNDER ENGLISH LAW

### Origin of Uses.

The modern trust has developed from the ancient 'use' in English law. It is, therefore, essential to refer briefly to uses not, as observed by Maitland,<sup>10</sup> for antiquarian purposes, but in order to throw light on the juristic nature of the modern trust.

The origin of uses in England, "has been generally attributed to the ingenuity of the clergy in order to escape from the prohibitions of the Mortmain Acts."<sup>11</sup>

After the Norman conquest, the greater part of the land was confiscated and was granted by the conqueror to his followers according to what is known

8. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 3, pp. 800, 892-893.

9. Pomeroy's Equity Jurisprudence, 5th ed., Vol. 3, pp. 891-892.

10. Maitland's Equity, 1916 ed., p. 24.

11. Story's Equity Jurisprudence, 3rd. ed., p. 396.

as the feudal system. In course of time, the grantee considering himself as substantially the owner began to imitate the example of his sovereign by carving out portions of his land to be held of himself by some other person, on terms and conditions similar to those of the original grant. This method of creating estates in the granted land was termed subinfeudation. A continued chain of successive dependencies was thus established connecting each stipendiary or vassal with his immediate superior or lord.

The peculiarity of the feudal system was the division of ownership. The absolute or nominal ownership was in one person, the lord or feudal superior; while the occupation and benefit of the land was in another person, the tenant or feudal inferior. In consideration of having the occupation and benefit of land, the tenant rendered his lord certain services which in the feudal system proper were principally of a military nature, and the lord was further entitled to certain incidents or casual profits, such as, relief,<sup>12</sup> wardship<sup>13</sup> and escheat,<sup>14</sup> etc. At first the interest of the grantee in the lands granted was for life so that on the grantee's death, the estate escheated to the grantor. By and by it acquired a hereditary character and could then only escheat to the grantor on the failure of all persons who could, under the grant, claim through him. All these estates were originally inalienable. But in course of time the right of alienation was also acquired.

After the power of alienation had been acquired, it became a common thing for the grantees of estates to convey them to religious houses who gradually obtained great quantities of land and an undue proportion of wealth and power. Such transfers, however, prejudiced considerably the interests of the lord or feudal superior. He was in such cases deprived of his profitable feudal dues. The members of these houses were unable, by reason of their profession, to perform the military services required by the feudal law. As religious houses fell within the legal description of corporations, they were never under-age, never died and could never be attained for treason or felony. There could, therefore, be no inheritance, no relief, wardship or escheat. Lands belonging to such bodies were consequently said to be in *mortua manu*, or in mortmain, *i. e.* in a dead hand, because they produced none of the advantages to the feudal lords which lands held by individuals did.

With a view to check conveyances to religious houses and corporations, the Statutes of Mortmain, 1279 and 1290 were passed which prohibited corporations from purchasing land unless a license in mortmain was obtained. In order to evade these statutes, the following device was resorted to by the ecclesiastical bodies. The transfer, instead of being made direct to the religious house, was made to some person to the use of the religious house.

A transfer of this kind conferred no estate or interest whatever in contemplation of law on those whose benefit was designed, for the principle of feudal tenure was to look no further than to the actual and ostensible tenant, and to consider him alone as the proprietor. The transferee who was not subject to the statutory disability was therefore in the eyes of law, the owner and the object of the use was a non-entity. These transfers, as such, escaped the operation of the Statutes of Mortmain. The religious houses were under the arrangement or agreement to have the profits and enjoyment of the land while the feoffees became legal owners of such lands.

The laity were not long behind in resorting to this contrivance. Many

12. *i. e.* a payment which a tenant of full age was bound to make to the feudal lord on succeeding to the land by descent.

13. *i. e.* the right to the custody of the land of an infant heir of land.

14. *i. e.* reversion of the land to the lord in default of heirs, etc.

objects could be gained by such a scheme. Maitland<sup>15</sup> explains them under the following five heads :

1. One could evade the feudal burdens of wardship and marriage. Of course if there was a single feoffee and he left an heir under age, the object could not be achieved for the lord would claim a wardship of this infant heir. But the practice was to have many feoffees—sometimes as many as ten as joint tenants and as these feoffees died off, fresh feoffees could be put in their places so that the lord's chance of a wardship could be reduced to a *nil*.

2. The Statutes of Mortmain could, as explained above, be evaded.

3. One could defeat one's creditors in this way.

4. The law of forfeiture for treason and escheat for felony could be evaded. The king and the lord could not look behind the feoffees to the feoffer who had no rights in the land, while that every one of the seven or eight feoffees should commit the offence was hardly to be expected.

5. By means of this device one could give oneself the power of making something very like a will of lands. The feoffees could undertake to carry out any direction as to the benefits of the land after the death of the feoffer.

"Some of the objects in resorting to uses may have been discreditable enough—men ought not to defraud their creditors—but others of those objects had the spirit of the time in their favour. Feudalism had ceased to be useful; it had become a system of capricious exactions—it was very natural and not dishonourable that men should attempt to free themselves from those burdens."<sup>16</sup> Such transfers were, therefore, not looked with disfavour and 'during the fifteenth century' uses of land became very common."<sup>17</sup>

It is important to note that the success of the scheme behind uses would have been marred if the common law had taken the view that after all the land is the feoffer's land, the feoffees are mere screen or the feoffees are merely the feoffers' agent and on that view would have treated the feoffers as the real owner and compelled the feoffees to carry out the object for which the land was acquired by them.

But the common law courts recognized no other estate than the legal one vested in the feoffee and the use remained altogether outside their purview. Consequently, the *cestui que use* or the beneficiary, *i. e.* persons entitled to the use or benefit of the land in those transfers, had no means of enforcing the object in such transfers against the feoffees and for a considerable time their rights remained purely moral depending upon the faith and integrity of the feoffees. Towards the end of the fourteenth century the Chancellors' aid was sought in case of a breach of such moral obligation "and although there is no record of a decree in favour of a *cestui que use* until 1446, probably relief was given in the first quarter of the fifteenth century."<sup>18</sup> Thus while the legal estate in such lands continued to remain in the feoffees, the beneficial interest became in equity, vested in the *cestui que use* and could be enforced through the Court of Chancery.

The doctrine of uses, as regulated and settled by the Court of Chancery became productive of serious grievances. "Persons who had a claim to the lands could not find out the legal tenant against whom it was necessary to proceed. Husbands were deprived of their courtesy and widows of their dowers, creditors were defrauded, purchasers for valuable consideration were frequently

15. Maitland's Equity, 1916 ed., p. 27.

16. Maitland's Equity, 1916 ed., at p. 29.

17. *Ibid.*, at p. 30.

18. A Manual of the Law of Real Property by R. R. Megarry, 1946 ed., p. 100.

defeated, and the king and other feudal lords were deprived of their tenures, and other inconvenience attended to the secrecy observed in making conveyances to uses, by which the beneficial interest belonged to one person and the legal estate to another."<sup>19</sup>

### The Statute of Uses

Several statutes were enacted, from time to time, with a view to restrict transfers of land on uses and to prevent the abuses or inconveniences flowing from them but it was not until the reign of Henry VIII that any effective step could be taken up by the Legislature in that direction. In the twenty-third year of the reign, he procured a bill to be introduced into Parliament which would have limited the power of conveying land to uses; it was passed by the House of Lords, but was rejected by the Commons. In the twenty-seventh year of his reign, he introduced a second bill which was enacted as the famous Statute of Uses, 1535.<sup>20</sup> The Statute of Uses was very unpopular and is considered<sup>21</sup> to have been one of the excuses, if not one of the causes, of the great Catholic Rebellion known as the Pilgrimage of Grace. The important clause in the statute is the first, the operative portion of which may be stated in the following words:

"Where any person or persons shall be seised of any lands or hereditaments to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence or trust (*i. e.* persons beneficially entitled) shall be deemed in lawful seisin and possession of the same lands or hereditaments for such estates as they have in the use, trust or confidence."

The Statute of Uses, it may be noted, did not forbid conveyances to uses, but, on the contrary, assumed that they would continue as before. The only change or relief which it introduced was a contrivance "to turn the equitable estates of the *cestui que use* into legal estates." Thus where A transferred land to B to the use of C, B, before the statute, had the legal estate in the land unaffected in law by the use in favour of C and C had the equitable estate in that land and was, in equity, entitled to the use which was due to or through the Court of Chancery extracted from the legal ownership of B. Afterwards by the Statute of Uses, C became or was made the legal owner of the land instead of his having merely the equitable title or ownership and the use became merged in the legal estate. The use was annexed to the possession of land and B, no longer needed the assistance of equity to enforce his interest in the land and the Court of Chancery thus became deprived of jurisdiction in such cases.

It need be noted that the following classes of cases did not come within the purview of the Statute of Uses and therefore, with regard to these the position remained as before.

1. The statute only applied where one person was *seised* of land to the use of another and was thus confined to freehold of lands. It did not, therefore, affect personal chattels or leaseholds or copyholds, of which there could be no seisin in the technical sense.

2. The statute did not, in the next place, touch special use or trust. The general doctrine was established that when any control or discretion is given to the feoffee or trustee in the application of rents and profits or where he is required to do any specific acts in regard to the land and in all similar instances of an express active or special trust, the legal estate remains in the

19. Agnew, *The Law of Trusts in British India*, 2nd ed., pp. 5-6.

20. It was repealed by the Law of Property Act, 1925.

21. Maitland's *Equity*, 1916 ed., p. 35,

feoffee or trustee to enable him to perform the trust reposed. Thus where land was conveyed to A to the use that he should collect the rent and from the proceeds pay annuities to X and Y or upon trust to sell and pay of the debts, the legal estate in the land, unaffected by the statute, remained in A in order that he might carry out the duties imposed upon him. But the statute applied if the use or trust was purely passive; so where the land conveyed to A upon trust to permit B to receive the rents, A had no estate in the land and the State vested the legal estate in the land in B who had otherwise simply the beneficial ownership or estate in the land. The line which divides the simple use or trust which is within the statute, from the active trust, which is not within the statutes, is as remarked by Maitland<sup>22</sup> "often a very fine one".

3. The statute was confined to express uses. Accordingly, uses created by implication or operation of law, *i. e.* resulting and constructive uses were held to be unaffected by the statute.

#### Revival of Uses as Trusts.

The revival of equitable jurisdiction in respect of uses is traced in the following manner :

Prior to the Statute of Uses, 1535, it had been held by the courts of equity that a use upon a use was inoperative and void. After 1535, there was some hesitation but the doctrine was ultimately confirmed and in the year 1557 it was held in *Tyrel's case*<sup>23</sup> that a use upon use was void notwithstanding the Statute of Uses. The common law Judges, in this case, determined that the statute could only operate upon one use and where another use was superadded it was a mere nullity. So in a grant to A to the use of B, to the use of C, the statute transferred A's possession to B and turned B's use into a legal estate, and having done this it went no further but stopped short and could not meddle with C's use, which was an interest unknown before the statute. Thus C who was intended to be the final and actual beneficiary took nothing under the conveyance.

The doctrine with regard to the second use gave the Court of Equity an opportunity of resuming the past jurisdiction in enforcing the secondary uses just as it enforced the primary uses before the statute. The Chancellor declared that although the legal title was vested in B by virtue of the statute, he could not, in good conscience, hold it for his own benefit, but he must hold for the benefit of and in trust for C. B was thus deprived of the beneficial interest in the land. Thus, there came to be and remain the twofold system of one person holding the legal estate in the land, while the equitable estate or the usufructuary right therein was vested in or enjoyed by another.

It was, however, "not until after 1660, when, by reason of the abolition of military tenures the return of uses could no longer do harm to the royal revenue that the Chancellor began to enforce the second use under the name of trust.....There are cases prior to 1660, in which we see the Chancellor enforcing the second use, the earliest of which appears to be *Sambach v. Dalston*<sup>24</sup>, but these cases must be regarded as decisions on especially hard cases.<sup>25</sup>

If it was desired to vest the legal estate in B for the benefit of C, the form in vogue before 1535 was "to B and his heirs to the use of C and his heirs". The form that was adopted after the middle of the 17th century was

22. Maitland's Equity, 1916 ed, p. 38.

23. 2 Dyer 155 a.

24. (1634) Tothill, 188.

25. Modern Equity by H. G. Hanbury, 2nd ed., p. 11.

“to A and his heirs to the use of B and his heirs in trust for C and his heirs”. It was not necessary, however, that there should be three persons named ; it was sufficient, and became the practice, to convey the land unto and to the use of A in trust for B. In such a limitation the use in favour of A was not executed by the statute, for the statute had no application where a person was seised to his own use, but only where he was seised to the use of another ; the presence of the use, however, in favour of A was effectual to make the trust in favour of B, a trust following after a use, and to prevent it from being executed, or turned into the legal estate, by the statute. Now that the Statute of Uses is repealed a conveyance of land to A to the use of or in trust for B would vest the legal estate in A and the equitable estate or beneficial interest in B.

The doctrine of trusts, in course of time, was extended so as to embrace not only lands but chattels, funds of every kind, things in action and moneys.

The Trustee Act, 1850 was the first general enactment dealing with the law of trusts, and, as amended by the Trustee Act, 1952, it remained the enactment chiefly governing the administration of trusts until 1888. The Trustee Act, 1888, made important alterations in the law of trusts and was followed by the Trust Investment Act, 1889, defining the authorised investments for trust funds. Four years later came the Trustee Act, 1893 which consolidated the statutory law and remained the principal Act dealing with trusts until January 1, 1926, when the Trustee Act, 1925 came into operation. By this Act, the law of trusts is consolidated and extended and previous enactments are repealed.

### TRUSTS UNDER THE INDIAN LAW

Trust, in the strict sense in which that term is used by English Lawyers, that is to say, confidences to the existence of which a double ownership, ‘legal’ and an ‘equitable’ estate, is necessary, are unknown<sup>26</sup> to Hindu and Mohamedan Law. But trusts in the wider sense of the word, where property is vested more or less absolutely in some person or persons for the benefit of other persons, were known to and often created by the Hindus and Mohamedans alike even before the advent of the British rule and administration of justice in this country. As observed by Stokes in his speech on Trusts Bill in Legislative Council in the year 1881, “Trusts created by an old man for his own maintenance and ulterior purposes, for a widow, for a daughter, step-daughter or daughter-in-law and her children, are of pretty frequent occurrence amongst the natives whether Hindus or Mohamedans.” There does not, however, appear to be an elaborate law on the subject in the Hindu or Mahomedan Law and a precise statement of the position or working during the earlier stages of the British Government may best be made through the following observations of West, J., in *In re Kahandas and Narrandas*<sup>27</sup> which though made in relation to Hindu Law applies, it is submitted, equally well to the Mahomedan Law :—

“.....while the substantive Hindu Law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rule by which effect is to be given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If the Court is called on to give effect to trust in any given case, it looks, indeed, to the Hindu Law of property to determine the estate,

26. *Tagore v. Tagore*, 9 B. L. R. 377, 401, per Willes, J.

27. (1880) 5 Bom. 154, at pp. 174-175.

of the trustee, but in many of the duties it annexes to that estate, the rights it recognizes as arising from the position of the beneficiaries, the means by which those rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate the "laws, manners, customs and usages" of the native community as these may subsist. It must not allow a trust to be made a means of conferring a gift *inter vivos* or by testamentary disposition upon a person not in existence at the moment when the donation is declared. It must not allow it to effect a course of devolution opposed to the Hindu Law of property and succession. Thus the operation of the native law is preserved as to the estates that may be taken in property and the purpose to which they may be applied, while it gains a flexible adaptation to new circumstances from the English system. In meeting an exigency or taking cognizance of a form of right not provided for in the Shastras, the Court, in exercising its jurisdiction under Section 41 of the Charter may certainly apply the Hindu Law. It must be careful not to overlook it but taking Hindu Law as one of its *data* it applies "English Law" also in the form of equity to all or nearly all the questions that arise.

"It would recognize and give effect to the Hindu Law as the Chancellor would give effect to an English custom, or the law imposed by its founder on a charitable trust, but having thus got its materials it would deal with them according to equitable principles."

In the course of time the law on trusts became codified in India. The principal enactments on the subject having a close resemblance with English Law on the subject are :—

**1. The Religious Endowments Act (XX of 1863).**—The religious endowments of the country in the early part of the 19th century were under the direct charge and superintendence of the Board of Revenue. But owing to missionary agitation in England and from the Government's consistent and old fixed policy of non-connection with the religious or the religious endowments of the Indians, the religious endowments were restored to their former trustees by the middle of the 19th century. The Religious Endowments Act divested Government officers of all direct superintendence and control of religious institutions in India and transferred their functions to managers or managing committees subject to the intervention of the Civil Courts on application made by any person interested in the trust or institution. There are in all 24 sections in the Act.

**2. The Indian Trust Act (II of 1882).**—The bill as originally drawn and as settled by the Indian Law Commissioners applied to the whole of British India. The Bill was then circulated to Local Governments. When the replies of the Local Governments and the opinions of select officers concerning it were received it was found that :

- (a) some of the Governments (as Bengal) considered legislation, in the direction of codifying the trust law of the country premature and altogether in advance of the requirements of the time ;
- (b) some others (the Punjab, Madras and N. W. P. *etc.*) opined that such legislation was absolutely necessary ;
- (c) the Bombay Government thought that the measure was premature but it suggested that if the legislature considered it advisable to pass it as an anticipatory measure, a provision might be made that the local extent of the Act might be left entirely to the discretion of the Local Governments.

In accordance with the recommendations of the Bombay Government, the Government of India thought it expedient not to bring the Act into operation in any part of India against the wishes of the Local Governments. Consequently, the Act was made applicable in the first instance, to such provinces, *e. g.* Madras, U. P. and C. P., *etc.* as agreed at that time with a proviso for extending the operation of the Act through a notification by the Local Government to that effect as was done in the Presidency of Bombay in 1891.

The Indian Trust Act, 1882, is confined to private trusts and does not apply to public or private religious or charitable endowments.<sup>28</sup> The Act contains no law which the Courts were not, before its passing, bound to administer, without its assistance. The only difference that the Act made was that, instead of the Courts grouping for principles and precedents to guide their decisions, the principles would be made ready for the Courts to follow.

There are in all 96 sections in this Act and its main provisions are :

- (a) How a trust may arise—[Ss. 80—96, dealing with implied and constructive trusts under the title of “Of certain obligations in the nature of Trusts”] or be created—Ss. 4—10 ;
- (b) how or by whom a trustee may be relieved from or be appointed to the office—Ss. 70—76 ;
- (c) what are the duties, liabilities, rights, powers and disabilities of the trustees—Ss. 11—54 ;
- (d) what are the rights and liabilities of the beneficiaries, *i. e.* those entitled to the benefit of the trust—Ss. 55—69 ;
- (e) under what circumstances or conditions may a trust be extinguished or revoked—Ss. 7 —79.

**3. The Charitable Endowments Act (VI of 1890).—**This Act comprising of 15 sections provides for the vesting and administration of property held in trust for charitable purposes. Charitable purpose, as defined in the Act, includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

**4. The Charitable and Religious Trusts Act (XIV of 1920).—**There are 12 sections in the Act which seeks to ensure a more effectual control over the Charitable and Religious Trusts by providing :

- (a) Facilities for the obtaining of information regarding such trusts.
- (b) Enabling trustees of such trusts to obtain the directions of a court on certain matters.
- (c) Making special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts.

28. *Pellayya v. Ramavadhanula*, 13 M. L. J, 364,



## CHAPTER XX

### DEFINITION OF TRUST AND ITS COMPARISON WITH OTHER ANALOGOUS RELATIONS

**Definition of trust** — “More than one definition of a trust is to be found in the recognized text-books on the subject ; but none of these learned and excellent works contains a definition which is altogether satisfactory.”<sup>1</sup> It is for this reason that Strahan made no endeavour to define a trust ; his view on the proposition being that “most of the writers or judges who have attempted such a definition have done little to assist the world to a clear conception of what a trust is.”<sup>2</sup>

The best definition or description of a trust, as estimated by Strahan<sup>3</sup>, is that of Underhill. He defines a trust thus :

“A trust is an equitable obligation, either expressly undertaken or constructively imposed by the court, whereby the obligor is bound to deal with property over which he has control for the benefit of persons of whom he may or may not himself be one and any one of whom may enforce the obligation.”<sup>4</sup>

This is a very complete description of ordinary private trust, but it would need modification to cover “trust of imperfect obligation” and all charitable trusts, the former of which cannot be enforced through a beneficiary while the latter is one which cannot be enforced except by or through the Attorney or the Advocate General.

An equally satisfactory definition of trust may be given through Section 3 of the Indian Trusts Act, 1882 :

“A trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner.” The definition may be illustrated through the following examples :

S transfers certain properties to T for the education of B. Here T becomes the owner of the property, but to his ownership is attached the obligation of using the property for B's education. The obligation arose through a confidence that was reposed in and accepted by T.

Then there may be a case where T, the owner of certain properties declares that such properties are thereafter to be used for an annuity for himself and for the maintenance of Y and then for Z and appoints himself the trustee. Here the obligation in question arises through a confidence declared and accepted by T, formerly an absolute owner and subsequently a trustee of the property.

This definition, as well, justifies the remarks of the learned writer quoted above in so far as this definition is defective because it contemplates or covers only private trusts and has outside its purview public trusts ; and further even

1. Underhill on Trusts and Trustees, 6th ed., p. 2.

2. Strahan's Digest of Equity, 5th ed. p. 56.

3. Ibid.

4. A Concise Manual on the Law of Private Trusts and Trustees by Underhill, 8th ed., p. 1.

in respect of private trusts it covers or applies only to what are called express or declared trusts and the implied, resulting and constructive trusts fall outside the purview of this definition. In other words, the term 'trusts' under this definition is restricted to 'private express trusts'.

It is worth while to mention the definition given by Halsbury as it has a tendency to distinguish the trust from other similar institutions. He suggests that "the trust relationship is that which arises where property is vested in a person or persons which they are obliged to hold in continual dominion and stewardship for the accomplishment of a particular purpose or for other persons according to their directions, such persons being given by equity a quasi, proprietary rights analogous to the common law right of ownership, which will prevail not only against the trustee himself but against any one else into whose hand the property comes, except only a *bona fide* purchaser of his estate".<sup>4a</sup>

It need, however, be remembered in support or justification of this definition that the Indian Trusts Act, 1882 does not apply to public trusts and that the implied, resulting and constructive trusts have not been included in the term 'trust' but have been provided for in a separate chapter<sup>5</sup> under the heading "Of Certain Obligations in the Nature of Trusts".

With a view to get rid of double ownership, legal and equitable, the interest of the beneficiary has been defined to be his right against the trustee as owner of the property. The beneficiary has, under the Act, no estate in the subject-matter of the trust.

The person who reposes or declares the confidence is called the "author of the trust" or the "settlor".

The person who accepts the confidence or upon whom the obligation is imposed is called the trustee.

The person for whose benefit the trust arises or has been created is called the "beneficiary" or the "*cestui que trust*."<sup>6</sup>

The subject-matter of the trust is called "trust property" or "trust money".

The instrument, if any, by which the trust is declared is called the "trust instrument" or the "trust deed".

A breach of any duty imposed on a trustee, as such, by the trust instrument or any law for the time being in force, is called a breach of trust.

The nature or characteristics of a trust would become clearer and more defined if we examine how trust resembles or differs from other analogous relations.

#### Trust and condition.

At common law only the grantor and his heirs could take advantage of a condition broken where it was contained in a deed and only the heir of the testator where it was contained in a will. In equity, however, it was held from an early time that the person in whose favour the condition was made could enforce it.

A transfers his house to B on the condition that he pays an annuity of Rs. 200/- to C. If A did not pay the annuity to C, C could not bring an action at common law against B to recover it. The right of action at common

4a. H. G. Hanbury—Modern Equity, 8th Ed. 110.

5 Ch. IX, Ss. 80—96.

6 Pronounced as setty KER trust.

law was limited to A or his heirs as the case may be to recover the house from A if he did not fulfil the condition. Equity recognized the right of C under the condition and allowed him to bring an action in equity to enforce it.

The similarity between a trust and condition lies in this that in both the owner of the property is subject to an obligation in favour of another which could not be enforced through the common law Court but was enforced through Courts of equity.

Ashburner<sup>7</sup> has distinguished cases of trust from cases of conditions in the following manner :

"First a trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition, express or implied, that B shall dispose of his own property in a particular way indicated by A.....

"Secondly, the obligation of the person on whom the condition is imposed is not limited by the value of the property which he receives, *e. g.*, if A makes a bequest to B on condition of B paying A's debts and B accepts the gift, he will be compelled in equity to discharge the debts although they exceed the value of the property." The obligation of the trustee, on the other hand, is limited by the value of the trust property.

#### Trust and bailment.

Bailment may be defined as a delivery of goods to another for a limited purpose upon a condition express or implied that they will be re-delivered to the bailor, or delivered to another at his order, after the limited purpose is completely fulfilled.

As a familiar example of a bailment may be mentioned the case of carriers of goods, *e. g.*, a railway company. So if A entrusts his goods to R for transit, A is the bailor and R is the bailee.

The similarity between a bailment and a trust lies in the fact that in both one person has, with or without consideration or reward, the possession or control of or dominion over a property at the instance or for the benefit of another. We need, however, compare the nature and the limits of such dominion or control in the two cases. The points of contrast between the two are as follows :

1. The obligation or right of the bailee in a bailment is legal while that the trustee in case of a trust is equitable.
2. In a bailment the bailor does not divest himself of ownership. He merely curtails his right of enjoyment of the thing bailed for the time being. The bailee has, therefore, only a limited or special property or ownership in the goods bailed.

Under a trust, on the other hand, the trustee becomes full legal owner of the property subject to it (with only an equitable obligation annexed as to its beneficial enjoyment) and therefore the settlor or the author of the trust ceases to have any right in the property.

So if A deposits a number of books with B and B sells the books to C, the sale being unauthorized by the terms of the bailment C, though he purchases in good faith and without notice of A's right—does not get a good title to the books. A can sue C for recovery of books and succeed because C purchased from B who was not the owner.

Let us take the case of a trust. X holds books as trustee for Y. In breach of the trust X sells them to S who buys in good faith and without

7. Ashburner's Principles of Equity, 2nd ed., p. 89.

notice of the trust or the sale being forbidden or unauthorized thereunder. Here S becomes the owner of the books and Y has no right against S who is a *bona fide* purchaser for value without notice.

3. The duties of the bailee in case of bailment can only be enforced by the bailor, the party at whose instance the service was undertaken. The obligations under a trust can be enforced by any one entitled to a benefit under the trust.
4. Whilst there may be a trust of all kinds of property, bailment extends only to chattels.

### Trust and agency.

An agent is a person who acts on behalf of another person, called the principal. The status of an agent, or the relation between him and his principal, is called agency.

In agency, just as in case of trust we have one person acting at the instance or for the benefit of another. We need, therefore, contrast the position of that person in agency, *i. e.*, the agent from that in trust, *i. e.*, the trustee.

- (i) A trustee has full title to the trust property in law ; an agent to whom has been transferred his principal's property does not have title to it, although he may have special power of disposition.
- (ii) An agent acts on behalf of his principal and subject to his control. A trustee acts in his own right and is not subject to the control of the author of the trust or of the beneficiary (unless he is the sole beneficiary or all the beneficiaries are of one mind) beyond his obligation to deal with the trust property in accordance with the terms of the trust.
- (iii) Agency is based on agreement between the principal and agent (*i. e.* the person who acts and the person for whose benefit he acts), but there is not necessarily an agreement between the trustee and beneficiary.
- (iv) The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against his *cestui que trust*. If, on the other hand, an agent enters into a contract as an agent he is not personally liable, the contract being with the principal.

### Trust and contract.

A contract is agreement plus legal obligation ; it is that species of agreement whereby a legal obligation is constituted and defined between the parties to it—*Salmond*.

We need, therefore, compare the obligations of the parties under a contract with those of the trustee under a trust :

- (i) The obligations of the parties to a contract are legal whereas the obligations of the trustee are equitable.
- (ii) The obligation under a contract unsupported by consideration [except where it is under seal or in writing and registered] is not enforceable, whereas the obligation of a trustee even under a voluntary trust (*i. e.* trust without consideration), if executed, is fully enforceable.

- (iii) The obligations under a contract can, as a general rule, be enforced or released only by the parties to it, not strangers. The obligations under an executed (as distinguished from a contract to create one) trust can only be enforced or released by a person for whose benefit it was created, though he is a stranger to it and can neither be enforced nor released by the person who created it unless he is also a beneficiary.

### **Trust and power of appointment.**

A trust may sometimes be created by a perfectly unilateral act, although it is common. Origin is an agreement between two persons. A man may become bound by a trust by his own declaration or conduct, while the beneficiary knows nothing.

As Salmond points out :—

“A trust is more than an obligation to deal with one's property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is concurrently vested. The beneficiary has more than a mere personal right against his trustee for the performance of the obligations of the trust. He is himself an owner of the trust property.”

Where a person is invested with the power to determine the disposition of property of which he is the owner, he is said to have power of appointment over such property. A power of appointment may be defined as an authority to dispose of an estate or interest in property to such persons as he (the donee of the power) may select. The person conferring the power is called the donor, and the person to whom it is given is called the donee of the power.

Such powers are traditionally classified as either general or special.

A general power of appointment imposes no restriction upon the donee's choice, allowing him to appoint any one, including himself. Thus a gift “to X for life, remainder as he shall appoint” gives X a life-interest and general power of appointment, since he can devise the property to any one he pleases.

It is open to the donee of the power to exercise the power as or in favour of whomsoever he pleases, but it is not necessary for him and he is under no obligation to exercise it. If he exercises the power, the property would go to the person appointed. If, on the other hand, he does not or fails to exercise the power, the property goes back to the donor of the power or his legal representatives, as the case may be.

A special power of appointment is one where the donee's choice is fettered by providing that he can appoint only among a limited class of persons; as where A is given a power to make an appointment of some property among his issues. Here A must, if at all, make a choice among his issues. He may give the property to any or to all in any share that he pleases, but he cannot choose any one other than his issues.

A special power of appointment may be a ‘more, bare or naked’ power or a power in the nature of or coupled with a trust.

The question whether there is a mere power or a power in the nature of a trust is one of construction in each case. If it appears that the intention is that the donee may appoint or not as he pleases, there is no trust. But it would be a case of trust if the intention of the donor of the power appears

to be implicit to benefit the class and the donee has been given the power *simply to select* out of the class sought to be benefited.

It is, however, clear that there will not be a power in the nature of a trust if there is a gift over in default of appointment and this is so even if the gift over is void, because the mere fact that the donor contemplated and provided for a default of appointment negatives a general intention of trust.

Even if there is no gift over, it does not necessarily follow that it is a case of trust. The test is whether the settlor or the donor of the power has demonstrated an intention to benefit the class. The tendency of the modern judges appears to be against a trust.

When the power is in the nature of a trust, *i. e.*, when there appears a general intention in favour of a class, and a particular intention in favour of the individuals of that class to be selected by the donee of the power, and the particular intention fails from that selection not being made by the donee, the Court will take upon itself his duties, in order that the intended object should not be prejudiced, and following the maxim "equality is equity", the Court will divide equally among all the members of that class although the donee might have distributed to any one in any proportion.

Thus, if A has a power to appoint by deed or will a fund of £1,000 in favour of his brother's sons, A may dispose of the fund to any or all of the brother's sons in any share that he pleases. If, however, he does not appoint and there is a general intention in favour of the class, *i. e.*, the power is in the nature of a trust, the Court will divide equally among all the brother's sons.

A trust may be distinguished from a *mere power* as follows :

"Powers", says Wilmut, L. C. J., "are never imperative—they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative."

The distinction may be split up and explained under two heads :

- (a) the accrual or enjoyment of the benefit under a trust is not dependent on the pleasure or whim of the trustee ; whereas it is so in the case of power. If the donee does not care to execute the power, no benefit can accrue to the objects of the power ;
- (b) under a power, the persons amongst whom the appointment is to be made have, in the absence of fraud, no action against the appointor if he does not appoint ; whilst if property is left on trust to divide, the beneficiaries may compel its division.

Power in the nature of a trust may be distinguished from cases of a trust pure and simple.

- (i) In trust the Court enforces or executes the trust in exact fulfilment of the purpose or provisions thereof, by appointing another trustee in place of the former. In case of a power in the nature of trust, the Court executes it as far as the general purpose, *i. e.*, benefit of the class as a whole is concerned—not the particular purpose, *i. e.*, not the power of selection from among the objects which could only be but has not been done by the donee of the power. In other words, the Court does not undertake to execute all the powers of the donee.
- (ii) In trust there is a defined proportion of the interests of the beneficiaries as ascertained by the settlor. In case of power in

the nature of a trust the property is, in the absence of any desire or intention on the part of the donor, divided equally among all the beneficiaries.

Lewin explains it in the following words :

“A mixture of trust and power is not to be confounded with a common trust to which a power is annexed ; for, in the former case, as in a trust ‘to distribute at the discretion of the trustees’, they are bound at all events to distribute, and the manner only is left open ; but in the latter case the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient.”

## CHAPTER XXI

### KINDS OF TRUSTS

#### Preliminary observation.

There are various kinds of trusts. In order to have a clear cut picture of the different kinds of trusts it may be necessary to bear in mind the simple but nonetheless a very important feature of these divisions, namely, that the numerous kinds of trusts are the result of cross-divisions. If we view or divide trust from one point of view it splits itself, say, into two parts. If we again draw another dividing line based on a different consideration or point of view, it would again be split into two or more other divisions or kinds. It would be useful to keep all such divisions apart and examine or explain each classification separately. Each kind of trust should be considered or understood in reference to or in contrast with its counterpart and should not be mixed or confused with a different part of an altogether different line of division.

If, for example, we divide trust as a whole from a certain point of view it is and can only be either public or private trust. Divided from another point of view it is either executed or executory. So if a trust is public we may say at once it cannot to that extent be private as well. Similarly; a trust cannot be executed as well as executory. But a public trust may be an executed trust or it may be an executory trust. There should be no confusion as to how a trust is or can, for example, be both public and executory at the same time.

The different kinds of trusts may be classified under five heads :

#### 1

#### CLASSIFICATION OF TRUSTS ACCORDING TO THE NATURE OF THE DUTIES OF THE TRUSTEES

In relation to the nature of the duty imposed on the trustee, trusts are divided into simple and special trusts.

#### Simple trust.

A simple trust is a trust wherein property is vested in one person upon trust for another and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the *cestui que trust* has the trust right to be put into possession of the property and to call upon the trustee to execute the conveyances of the legal estate as he (*cestui que trust*) directs.

Thus where X transfers property to A in trust for B, A is a mere passive depository of the trust property with no active duties to perform. Here A is simply the servant of B and it is his duty in most cases (*i. e.* except in cases of minors, lunatics, *etc.*) to carry out B's order with regard to the trust property and B may at any time put an end to the trust by demanding a conveyance of such property.

#### Special trust.

A special trust is a trust where the machinery of a trustee is introduced



for the execution of some purpose particularly pointed out by the settlor and the trustee is not, as in a simple trust, mere depository of the trust property, but is called upon to exert himself actively in the execution of the settlor's intention ; as where a conveyance is made to trustees upon trust to sell for payment of debts and devote the residue to some charity, or a trust for B for life and thereafter for the education of B's children, the property ultimately to be sold and distributed among X, Y and Z.

In such cases the duties of the trustees are not left to be determined by the pleasure of the beneficiary but are specifically laid down by the settlor.

A special trust may, in course of time, become reduced to a simple trust. Thus, where A conveys property on B in trust to receive the income and after discharging all expenses and outgoings, to pay the net income to C for life and upon C's death to hold the property in trust for D, it would be a special trust till the life of C because during that period B would have active duties to perform. But upon C's death the trust would become a simple trust, and B, a passive trustee inasmuch as the active duties originally attached to the trust office lapsed by the death of C, and the only duty which remained was to do as D desired or directed.

## 2

### CLASSIFICATION OF TRUSTS ACCORDING TO THEIR OBJECTS

The most fundamental division of trusts depends upon the class or nature of persons for whose benefit they are created. Divided in this way a trust is either a private trust or public (or charitable) trust.

#### Private trust.

A private trust is a trust for the personal benefit of some individual or individuals or a class of individuals, *e. g.* a trust for the benefit of A or for the benefit of the sons or descendants of X and Y.

#### Public or charitable trust.

It is trust for the benefit of the public at large or some considerable portion of the public answering a particular description ;<sup>1</sup> stated in other words, it is a trust "for the benefit of the community or of an appreciably important class of the community",<sup>2</sup> *e. g.*, a trust for the advancement of education irrespective of caste or creed ; or a trust for the advancement of a particular religion or a certain sect of it.

It is important to note that it is not the number but the character or class of the beneficiaries as such which is the basis of this division. There may be, say, fifty beneficiaries (*e. g.* as descendants of X) entitled to the immediate benefit under trust and yet it may be a private trust, while there may be only one beneficiary (*e. g.* as the best student in or even of a certain community in the LL. B. final class of the University of Allahabad) entitled to the immediate benefit under the trust and yet it may be a public or charitable trust. Similarly, ".....a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important, it is then clearly not a charity."<sup>3</sup>

1. *Nabi Shirazi v. Province of Bengal*, I. L. R. (1942) Cal. 211, 248.

2. *Verge v. Somerville*, (1924) A. C. 496, 499.

3. *Inland Revenue Commissioners v. Baddeley and others*, (1955) A. C. 572, 592 p. r Viscount Simonds,

The distinctive features of these two kinds of trusts may best be presented through the following observations of Lewin :

"In private trusts, the beneficial interest is vested absolutely in one or more individuals who are 'or within a certain time may be, definitely ascertained and to whom, therefore, collectively, unless under some legal disability it is, or within the allowed limit will be, competent to control, modify, or determine the trust.....A public or charitable trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust is itself of a permanent and indefinite character beyond the power of the beneficiaries to control, modify or determine it.'"<sup>4</sup>

The distinction, it may be observed further, between a public and a private trust, specially when the former is reduced or limited to a section of the community and the latter is raised or extended to an appreciable or indefinite number of persons is, indeed, very obscure. The essential mark of charity in such cases is the quality which distinguishes the beneficiaries from other members of the community. If the relationship between members of the class is a personal one and in no way dependent on their status or conditions as members of the community it would not be a charitable gift.<sup>5</sup> "A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."<sup>6</sup>

Thus a trust for the benefit of the employees of a particular undertaking<sup>7</sup> or company<sup>8</sup> or even for the education of their children<sup>9</sup> would not be charitable although the employees so indicated may be very large in number, *e. g.*, over 110,000. If, however, the gift be for the advancement of education in general, *e. g.*, "for the promotion and furtherance of commercial education among British-born subjects of either sex", its validity as a charitable gift will not be affected by the addition of a proviso that preference should be given to the employees of a particular community or their families.<sup>10</sup>

The nature and scope of a public or charitable trust needs a fuller treatment but it would be convenient to take up this topic after concluding all the divisions of trusts.

### 3

## CLASSIFICATION OF TRUSTS ACCORDING TO THE MODE OF THEIR CREATION

In relation to the mode of their coming into existence trusts are divisible

4. Lewin on Trusts, 11th ed., p. 18.

5. *In re Compton* (1945) Ch. 123.

6. *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, (1950) A. C. 297, 306. per Lord Simonds ; Lord MacDermott dissenting and holding that it is sufficient if the beneficiaries form a class as distinguished from a collection or succession of particular individuals and adding that no fundamental distinction as respects personal and impersonal nature of the common link can possibly be drawn between those employed, for example, by a particular university and those whom the same university has put in a certain category as the result of individual examination and assessment.

7. *In re Compton*, (1945) Ch. 123.

8. *In re Cox, Baker v. National Trust Co. Ltd.*, (1955) A. C. 627.

9. *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, (1950) A. C. 297.

10. *In re Koettgen's Wills Trusts*. (1954) 1 Ch. 252. The further provision that it was only on the failure of the preferred class that the benefit was to go to the general class, appears to be questionable notwithstanding the fact that the maximum reserve for the preferred class was only 75%. The case, in this respect or to this extent, seems to be a device to get over the difficulty created by the decisions referred to or summed up above.

into ; express or declared trust, implied or presumed trust and constructive trusts. These are three other kinds of trusts either as a distinctive class or only as a species of either of the above three which fall and must be included under this head. Those are : resulting trust, precatory trust and secret trust.

This is the most complicated of all the classifications and the enquiry may, in the first place, be confined to the first three kinds of trusts.

#### **Express or declared trust.**

An express or a declared trust is one which is clearly and directly created in express words by the settlor. It may be created by deed or will or even by word of mouth.

A conveys properties to B and directs him to hold it for the benefit of X or for the benefit of Y for life and thereafter for Y's children. Here A creates an express or a declared trust.

#### **Implied or presumed trust.**

An implied or presumed trust is one which is indirectly gathered from the unexpressed but presumable intention of the settlor. It arises where property is not held by a person subject to any declared trust, but became vested in him under such circumstances as will lead the Court to presume, till the contrary is shown, that the person who was entitled to make such a declaration intended the property to be held for his own benefit or the benefit of another.

Thus where A purchased land and had it conveyed not to himself but to B, it would be a case of implied trust and B would *prima facie* hold it as a trustee for A.

Similarly, where A conveys to B two fields X and Y and declares a trust in respect of X but says nothing about Y. In the absence of anything to the contrary e. g., in the absence of anything to indicate that A intended to transfer the beneficial interest in Y to B, B would hold Y in trust for A.

#### **Constructive trust.**

A constructive trust means a trust which is not created by words or circumstances importing an intention to create trust, but is imposed by Courts of equity in order to prevent the inequitable acquisition of another's property. It arises in case of an advantage gained by a fiduciary or by a person through undue influence or through conduct which is otherwise unconscionable.

In the words of Snell it is a trust "which is raised by construction of equity, in order to satisfy the demands of justice without reference of any presumable intention of the parties, either express or implied."

Thus where A is employed as an agent by P for the sale of a certain property, the minimum acceptable being specified as Rs. 500 and A keeps the property with him representing to the principal that he has sold it just for Rs. 500, A would be a constructive trustee for P of the property or of any profit which he makes by its actual sale.

So also where T is a trustee of a leasehold for A and while still a trustee he obtains a renewal of the lease in his own name and for his own benefit, T would be a constructive trustee for A of the renewed lease, because it was in breach of his duty to renew the lease for the trust.

In all such cases a trust is raised by construction of equity in order to satisfy the demands of justice and good conscience without reference to any intention, express or implied, of the parties.

Some text writers prefer to classify all these three kinds of trusts under two heads.

Strahan,<sup>11</sup> for example, has placed declared and presumed trusts together under the term 'actual trust' in contradistinction to 'constructive trust'. The justification for this classification is that presumed or implied trusts are nothing more or less than express trusts declared in an artificial or indirect manner. The word 'constructive' in legal phraseology is opposed to 'actual' and a constructive trust is based on the ground that there has been no actual trust, but the Court for its own purposes treats the transaction as if there had been one.

On the other hand, Underhill,<sup>12</sup> for example, places implied and constructive (which he prefers to name a pure constructive trust) trusts together under the term constructive trust in contradistinction to an express trust. The justification for this classification is that an express trust is created directly by the words of the parties while the other two kinds of trusts arise only by operation of equity *i. e.*, cannot be created except by a construction put upon by the Court upon the transaction between the parties.

It is submitted that it would be better without there being anything wrong—at any rate nothing more than that involved in classifying them under only two heads—in treating each as a separate and distinct kind of trust. Express, implied and constructive trusts as defined above, may be distinguished, in the following manner :—

*Distinction between an express and constructive trust :*

- (i) An express trust arises by the acts and declarations of the parties alone whereas a constructive trust arises only by the operation of law. In other words, an express trust is the creation of the parties whereas a constructive trust is the creation of law.
- (ii) For the creation of an express trust, compliance with such formalities as are required by law is essential ; whereas no formalities are prescribed or necessary for a constructive trust.

*Distinction between an express and an implied trust :*

- (i) Both are based on the intention of the settlor ; but while intention, in case of express trust, is evidenced by the express language of the author of the trust, intention, in case of implied trust, is presumed from the relationship of the parties or the circumstances of the case.
- (ii) An express trust is created by the acts and declarations of the parties alone while an implied trust arises by the operation of law.

*Distinction between an implied and constructive trust :*

- (i) Both are the creation of law ; but while the implied trust is based on the intention of the parties ; a constructive trust is created by the Court independently of the intentions of the parties (and usually in opposition to the intention of the party bound by it).<sup>13</sup>

11. Strahan's Digest of Equity, 5th ed., pp. 55—58.

12. Underhill on Trusts and Trustees, 6th ed., pp. 8-10.

13. See the examples given above of constructive trusts where it becomes a trust without any intention or declaration, and in opposition to the intention of T.

- (ii) In case of an implied trust there is merely a rebuttable presumption of trust, while constructive trust is conclusive.

The other three division or kinds of trusts, may now be taken up for consideration

### Resulting Trusts.

Resulting trust is only a species of implied trust. An implied trust may arise either in favour of the settlor or his legal representatives or it may arise in favour of persons other than the settlor or his legal representatives. An implied trust in the former class of cases has been particularised by the specific name of "resulting trust".

A resulting trust may be defined to be that species of an implied trust which arises in favour of the person creating it or his legal representatives.

Lewin points out that Resulting Trusts arise, either (a) where a person being himself both legally and equitably entitled makes a conveyance, devise or bequest of the legal estate, and there is no ground for the inference that he meant to dispose of the equitable interest, or (b) where a purchase of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest.

Thus where A transfers some properties to T in trust for B for life with no instruction about the beneficial interest after B's death, it will, after B's death, be a resulting trust in favour of A if alive or his legal representatives.

Although a resulting trust can arise in all trusts—express, implied or constructive—it must be treated as a division only of an implied trust since the principle of evolution is the same in each case.

A resulting trust may arise in any of the following four ways or circumstances :

- (i) *Imperfect declaration*.—A transfers properties to the trustee T in trust for persons not specified at all or not specified with sufficient distinctness. It will be a resulting trust in favour of A or his legal representatives.<sup>14</sup>
- (ii) *Want of consideration*.—A transfers to X without consideration or purchases in his name certain properties. X would, in the absence of anything leading to the contrary inference, hold the properties in trust for A or his legal representatives as the case may be.<sup>15</sup> The principle and result is the same where A purchases the property in the name of his own and X or others jointly. This would be a case of a resulting trust. This rule or presumption of a resulting trust in favour of the purchaser does not apply or is rebutted within the ambit of the doctrine of advancement.<sup>16</sup>
- (iii) *Unused residue*.—A creates a trust of Rs. 5,000/- for the maintenance of X but X dies before anything is spent on him. It would become a resulting trust in favour of A or his legal representatives. Similarly, if A transfers property in trust for the son of H and W and the only son of H and W is declared illegitimate, it would be a resulting trust of the unused residue.

14. See Ch XXIII, *infra*.

15. *Dyer v. Dyer*, (1788) 2 Cox. Eq. 92.

16. See pp. 80-82, *supra*.

- (iv) *Unexhausted residue*.—A transfers Rs. 20,000/- to T in trust for the study of journalism by X. X completes his education and settles in life, after spending only Rs. 16,000/- from the trust fund. T would hold Rs. 4000/- as a trustee (if being a resulting trust) for A or his legal representatives. Similarly, if A transfers properties to T in trust for the payment of his debts and there is some money or property left after paying of the debt, such money or property would thereafter be held as a resulting trust.

Resulting trust, as represented by Hornman, J. arises where the expectation of the settlor "is for some unforeseen reason cheated of fruition, and is an inference of law based on after-knowledge of the event".<sup>16a</sup>

There may be cases wherein it would become extremely difficult to decide where a resulting trust would arise in respect of the residue or surplus of the trust.

A working formula for decision in the class of cases represented by the former of the above two illustrations, as laid down by Wood, V. C. in *In re Sanderson's Trust*,<sup>17</sup> may be stated as follows :

If a gross sum, or if the whole income of property be given and a special purpose be assigned for that gift, it would be an absolute gift, the purpose specified being simply the motive for the gift. The gift, therefore, takes effect as to the whole sum or the whole income as the case may be, and there would accordingly be no resulting trust after the completion or failure of the specific purpose. If, on the other hand, the settlor had only the specific object in view and set apart a fund or property for the probable or estimated expenditure of the same, the residue or surplus would be subject to resulting trust.

Thus, where a fund was subscribed by the friends of a deceased clergyman for the education of his children and there remained a residue of the trust fund after the children had finished or discontinued their education, it was, on the view that education was merely the motive of the gift and the intention must be taken to have been to provide for the children in the manner most useful, held that there arose no resulting trust in respect of the balance and that the same was divisible equally amongst the children.<sup>18</sup>

The other formula applicable to cases represented by the latter of the above two illustrations is, in the words of Lord Eldon in *King v. Denison*,<sup>19</sup> as follows :

"If I give to A and his heirs all my real estate, charged with my debts, that is a device to him for a particular purpose but not for that purpose only. If the device is upon trust to pay my debts, that is a device for a particular purpose, and nothing more ; ..... where therefore the whole legal interest is given for the purpose of satisfying Trusts, and these Trusts do not in their is not exhausted belongs to the Heir ; but where the whole legal interest is given for a particular purpose, with the intention to give to the Devisee of the legal Estate the beneficial Interest, if the whole is not exhausted by that particular purpose, the surplus goes to the Devisee ; as it is intended to be given to him".

16a. *In re Gillingham Bus Disaster fund, Bowman and others v. Official Solicitor*, (1958) 1 Ch. 300, 310.

17. 3 K. & J. 497, 503.

18. *In re, Andrew's Trust, Caester v. Andrew*, (1905) 2 Ch. 49.

19. (1889) 1 V. & B. 260

Thus where the bequest was : "All my effects including rubber and all other shares I leave absolutely to my sister.....on trust to my wife per annum (three hundred pounds)",.....it was held<sup>20</sup> that there was no resulting trust and the sister was entitled to the beneficial interest in the balance left after satisfying the annuity.

But where certain amount has been deposited in the bank in joint names payable to either or survivor,—it was held that on the death of one, there is resulting trust in favour of his heirs, unless facts and circumstances show contrary intention.<sup>21</sup>

It need be noticed for all such cases that where the purpose of the transfer is illegal there would be no resulting trust after the fulfilment or failure of the same. So, where X purchased properties in the name of Y in order to entitle him to a vote in the Parliament it was, dismissing the claim for resulting trust, observed that "the grantor deserves all the consequences attached to the illegality of his act. If the crime is not completed, the merit is not his, and therefore, in such a case, I should not think myself bound to relieve him against the heir of the grantee".<sup>21</sup>

It may be added that resulting, like any other implied trust, is simply a presumptive trust and would arise only in the absence of proof to the contrary and would, indeed, be displaced or negated if it is shown that the balance was meant for some one else.

### Precatory Trust.

Everyone, intending to create a trust, generally indicates his intention in clear and unambiguous terms to that effect. But sometimes there are cases wherein the words accompanying a transfer of property are, instead of being definite and imperative in favour of a trust, only precatory *i. e.*, recommendatory. Such transfers give rise to the question whether it is an absolute transfer, or a transfer subject to a trust. The question whether and under what circumstances it would lead to a trust notwithstanding the nature of the words used may, for the time being, be passed over and it may simply be noted that if a trust does arise in such a case, it would be called a precatory trust. It may be mentioned that Rigby, J., *In re Williams*,<sup>22</sup> protested strongly against the use of the term 'precatory trust' calling it a 'misleading nickname'. The term, however, continues to exhaust the whole, so much of the beneficial interest as is to be in vogue and denominative of a particular kind of trust.

A precatory trust may, therefore, be defined as a trust declared and created by precatory words *i. e.* words of request, prayer, hope, desire or the like.

So where a testator bequeaths property to A and states that he 'hopes and doubts not' or 'recommends' or 'desires' that it will be applied for the benefit of B, it will, if it gives rise to a trust, be called a precatory trust.

20. *In re Foord*, *Foord v. Candler*, (1922) 2 Ch. 519

20a. *Krushanadas Nagindas Bhate v. Bhagwandas Ramchoddas*, A. I. R. 1976 Bom. 153.

21. *Groves v. Groves*, (1829) 3 Y. & J. 163, 174 ; See *Birch v. Blagrave*, (1755) 1 Amb 264—at p. 64 ante—which was distinguished in and from this case on the ground that in the former, the purpose was entirely in the breast of the grantor and the execution of the purpose depended solely on his pleasure whereas in the latter, the conveyance was with the privity of the grantee and its use and effect were in the breast of the grantee and not of the grantor.

22. (1897) 2 Ch. 12.

There is a certain amount of controversy with regard to the question whether precatory trust is a species of an express or an implied trust but the better opinion, supported by the weight of authorities, is that it is only a form of an express trust. Underhill in referring to the controversy has concluded as follows :

"It is submitted that trusts arising from precatory words are essentially express trusts, that is to say, they are expressed, although in ambiguous and uncertain language."<sup>23</sup>

### Secret Trust.

This is another form or species of an express trust. The peculiarity in this case lies not in the nature or import of the words used to indicate the intention of creating a trust but in the manner in which the intention of creating or imposing a trust is declared.

When property is vested in a person for purposes not declared by the instrument itself which devises or grants it, and it appears that but for the testator's or grantor's confidence that the purposes would be fulfilled, the devise or grant would not have been made or that but for the devisee's acceptance the will would have been revoked, and on the ground that fraud would be committed by the devisee or grantee, if he did not fulfil those purposes, the trust in equity would be enforced and the object of the transfer would be carried into effect.<sup>24</sup>

A, by means of a will, devises land to T, and nothing of a trust appears in the will. But A says or writes to T, that he is to hold that property in trust for X to which T agrees. After the death of A, the property will, by virtue of the will, vest in T but it will be held by T only as a trustee for X. It is called a secret trust.

A secret trust may, therefore, be defined as a bequest or devise of property by a testator to a person on promise—verbal or otherwise but not incorporated in the instrument—by the latter to hold the same in trust for another or others.

Transfers leading to or becoming a secret trust may be so because the formalities necessary for the creation of an express trust were sought to be evaded and as such no mention of a trust was made in the will or it may be that the idea of a trust was an afterthought which was not given the proper form due to the consent or acceptance of the devisees.

Secret trusts are, clearly enough, only express trusts *i. e.* expressed in a particular way *i. e.* secret way.

The rule with regard to the validity of a secret trust is that if the secret trust would have been valid as an express trust, it will be enforced against the legatee or devisee ; while if it would have been invalid as an express trust, the bequest fails altogether. It is however, essential that the trust by which the legatee is sought to be bound must be communicated to and accepted—expressly or impliedly—by the legatee during the lifetime of the testator.<sup>25</sup>

The leading case on secret trusts is *Tee v. Ferris*.<sup>26</sup> In this case, Robert Suple, by his will, devised real and personal property to Ferris (one of the defendants) and the plaintiffs [Tee Chanter and Wills as also to one Dix who

23. Underhill on Trust and Trustee 6th ed., p. 9.

24. Manuel Louis Kunha v. Jnana, 31 Mad. 187.

25. Kali Charan v. Ram Chandra, (1903) 30 Cal. 783.

26. 69 Eng. Rep. 819. For an Indian case, see Kali Charan v. Ram Chandra, 30. Cal. 783.



forfeited his interest under a clause in the will] as tenants in common. The same day the testator signed a letter addressed to the plaintiffs and Ferris stating that the will was executed because he was, for the present, unable to decide upon the disposal of property, and that if he died without making any such declaration, they should hold the property in trust for such charitable purposes as they think fit. At the time of the testator's death this letter was read to him in the presence of Ferris. The plaintiffs, however, remained ignorant of this letter till after the testator's death.

In a suit by the plaintiffs, each claiming one-fourth of the property as their absolute estate it, was held : (i) that the plaintiffs' claim must succeed since the testator's intention in favour of charity was never, during his life, communicated to and accepted by the plaintiffs, (ii) that with respect to Ferris, his one-fourth share must be subject to the trust since the declaration as to such a trust was communicated to and impliedly accepted by him before the testator's death.

It would thus appear that where the bequest is to more than one person—which may be as tenants in common or as joint tenants—only those or shares of those would be bound by or subject to trust to whom the testator's intention for a trust is conveyed and by whom it is accepted before his death. There is, however, some difference in this respect where the transfer is as joint tenants in which case the promise of one, *provided it is made before the will or transfer*, will bind the other or others equally.<sup>27</sup> The distinction is based on the ground that no person can claim an interest under a fraud committed by another but there is nothing on principle to distinguish a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise.<sup>28</sup>

Secret trusts are divisible into : (a) fully secret trusts and (b) half secret trusts ; the former being those where the deed or instrument is altogether silent regarding the intention or object of transfer while in the latter it is clearly indicated that the transfer is subject to a trust but the particulars of that trust are kept undisclosed. Generally speaking, the same principles—regarding, for instance, the validity of trust and the principle on which it must be upheld or the admission of parol evidence—are applicable in both these classes of cases.<sup>29</sup> There is, however, one important distinction between the incidents of the transfer in these two cases inasmuch as there is, in the case of a half secret trust, no chance of the transferee taking the properties absolutely or beneficially even where the trust fails.

Thus in *In re Rees, Williams v. Hopkins and others*,<sup>30</sup> the bequest was "to my trustees they well knowing my wishes concerning the same" and the testator was said to have orally expressed the intention that the trustees should take beneficially after spending on specified items. It was held that the estate left after spending on specified items was undisposed of by will and passed as on intestacy. The ratio of the decision seems to be that proof of "directions as to beneficial interest" would be to contradict or vary and not explain or add to the will. It is not permissible for the transferees to turn round and say : "we are no longer trustees ; we now take beneficially" any more than that they could say : "we are trustees for ourselves".

27. *Re Stead*, (1900) 1 Ch. 237.

28. *Snell's Principles of Equity*, 24th ed., p. 97.

29. *Blackwell v. Blackwell*. (1929) A. C. 318,

30. (1950) 1 Ch 204 (C. A.).

**Sub-divisions of an Express Trust.**

An express trust has been sub-divided into (a) Executed trust ; (b) Executory trust.

**Executed Trust.**

An executed trust is one which is fully and finally declared by the instrument creating it or where, "the settlor is his own conveyancer."<sup>31</sup> Here the limitation of the estate of the trustee and the beneficiaries are perfected and declared by the settlor and *nothing more remains to be done to be perfect or give effect to the trust.*

Thus where A transfers land for sale to T in trust for B, C and D equally the trust has been declared fully, and finally, the property has been transferred the interest of the beneficiaries has been defined and there does not remain anything more to be done in order to make the trust operative. This is an illustration of an executed trust.

**Executory Trust.**

An executory trust is either an agreement or covenant for the subsequent execution of a trust instrument, or a sort of sketch, given usually by a will, of a trust, the details of which are to be afterwards filled in and perfected by the trustee. The essence of an executory trust is that *something more requires to be done in order to make the destination completely certain or the trust operative.*

Thus if A promises in writing to settle certain property upon trust for the benefit of B or if A transfers certain property to T in trust for B and C 'as the counsel shall advise,' it would each be an illustration of an executory trust.

Executory trusts usually occur either in marriage articles or in wills.

In the words of Strahan or where the declaration (of the settlor) itself sets out fully and formally the trust on which the trust property is to be held the trust declared by it is called an executed trust. Where the declaration takes the form of an agreement or direction for the subsequent execution of a proper trust instrument, the trust declared by it is called an executory trust."

## 4

**CLASSIFICATION OF TRUST IN REFERENCE TO  
THE CONSIDERATION, IF ANY, FOR THE  
CREATION OF A TRUST**

Divided in this way a trust is either (a) a trust for value or (b) a voluntary trust.

**Trust For Value.**

A trust for value is one which is created in lieu of a consideration moving from or a detriment suffered by the beneficiary. Here the relation between the settlor and the *cestui que* trust is contractual.

Illustration : A creates a trust for the payment of his creditors who consent to reduce the debt by 5% ; or where A creates a trust in favour of X if he marries Y.

31. As observed by Lord St. Leonard in *Egerton v. Earl Brownlow*, (1853) 4 H. L. Cas. 210.

### Voluntary Trust.

A voluntary trust is one which is created for no consideration moving from or detriment suffered by the beneficiary.

Illustration : A conveys land to trustees upon trust for B because B has been a good friend of A or because B has already married A's daughter though before marriage A made no promise.

A trust in favour of a deity would not be one for value as the securing of merit by dedication of property to the service of God cannot be treated as forming a good valuable consideration ; and if it were so, even a gift will have to be treated as one with valuable consideration.<sup>32</sup>

There is no difference between a trust for value and a voluntary trust provided it is an executed trust. If the trust has once come into operation or is capable of coming into operation without the settlor being required to do anything, the beneficiaries under the trust, irrespective of the consideration whether it is for value or voluntary, are entitled to enforce the trust. But if the trust is executory and something remains to be done by the settlor to bring the trust into operation, it cannot, on the equitable principle expressed through the maxim 'Equity will not aid a volunteer' be enforced if the trust is voluntary.<sup>33</sup> An executory trust can be enforced only when—

- (a) the agreement to create a trust was based on valuable consideration ; and
- (b) a party to the consideration requires the performance of the agreement.

Parties to the consideration for an agreement to constitute a trust consist of—

- (i) persons coming within the marriage consideration. If the agreement to constitute a trust is made in consideration of marriage, the spouses as well as the issues of the marriage come within the marriage consideration ;
- (ii) persons who gave valuable consideration other than marriage for creating a trust ;
- (iii) trustees for any of the above.

It is, however, important to note that where the Court on the demand of a party to the consideration compels the settlor to constitute the trust, it will compel him to constitute the *whole* trust—that is, not only those provisions of it which are for the benefit of the parties to the consideration but also such provisions, if any, which are for the benefit of volunteers. In other words, if an incompletely constituted trust is enforced at all, it will be enforced in its entirety *i. e.* in favour of all the beneficiaries irrespective of the consideration whether they gave value or are mere volunteers.

Uncovered by the above classification and without a counterpart, there is another kind of trust called ;

### Trust of Imperfect Obligation<sup>34</sup> or Illusory Trust.<sup>35</sup>

One of the important attributes of a trust is that the trustee's obligations

32. Janardhan v. Janardhan, A. I. R. 1927 Nag. 214.

33. Ellison v. Ellison, (1802) 6 Ves. 656.

34. See Strahan's Digest of Equity, 5th ed., p. 84

35. See Underhill on Trusts and Trustees, 6th ed., p. 32.

under the trust instrument or the general law are enforceable in a Court of equity. So the beneficiary concerned has the right to insist on the performance of the obligations under a trust. But there are certain cases in which the so called trustees have an arbitrary power and it is left to their pleasure whether or not the object is fulfilled or the purpose carried out. It has no legal or equitable sanction behind it. The underlying principle being that the object of the settlor is to make the settlement merely for his own convenience and not for the benefit of persons named in the settlement. Such a case or transfer of property has been called a trust of imperfect obligation or illusory trust and it may be defined or described as follows :

It is such a trust that equity will not compel its performance but will leave the trustee perfectly free to carry it out if he wishes. If he does not choose to carry out the object no one can insist on its performance and if it remains unexecuted, it will be a resulting trust. If, on the other hand, he complies with the wishes of the testator and executes the object, the residuary legatees or those entitled to the property in question on intestacy can have no cause of complaint.

There are three kinds of cases in which a trust of this kind may arise :

- (i) Trusts of money voted by Parliament or granted by royal warrant, where officers charged with executing the trust are responsible only to the government or the crown.

Thus funds voted by Parliament in England for the public service have been held not to be trust funds in the hands of the Secretaries of State (who receive them from the Treasury) in favour of private persons. Accordingly in *Kinloch v. Secretary of State for India*<sup>36</sup> where her late Majesty the Queen of England, by royal warrant, granted booty of war to the Secretary of State for India *in trust* to distribute amongst the persons found entitled to a share in it by the Court of Admiralty, it was held that the warrant did not operate as a declaration of trust in favour of such persons, but merely made the Secretary of State the *agent of the Sovereign* for the purpose of distributing the fund.

- (ii) Trusts for the payment of creditors : *Prima facie* a trust deed for the payment of the settlor's creditors *generally* is deemed to have been made for the personal convenience and accommodation of the debtor.<sup>37</sup> It is the same as if he had put a sum of money into the hands of an agent with directions to apply it in paying certain debts.<sup>38</sup> The creditors cannot, therefore, enforce the payment of debts in their favour.

But there may be cases where the motive of the debtor is not to promote his own convenience but to benefit his creditors, it would then be a trust and the creditors can enforce its provisions in their favour. Whether or not there is the intention to create a binding trust can be decided by a consideration of the deed as a whole and of the surrounding circumstances. In the following circumstances there is an inference that the deed was intended to create a binding trust in favour of the creditors :

36 (1880) 15 Ch. D. 1

37. *Garrard v. Lord Lauderdale*, (1830) 3 Sim. 1.

38. *Acton v. Woodgate*, (1833) 2 My. & K. 493.

- (a) Where the creditor is an actual party to the arrangement or the trust deed.<sup>39</sup>
- (b) Where the creditor, though not a party to the arrangement, has been induced by notice of the trustee to delay their demands for payment.<sup>40</sup> The conveyance in such cases, though originally revocable, becomes irrevocable and operates as a trust.
- (c) Where the trust is not merely for creditors but for objects which cannot be satisfied unless the deed irrevocable *e. g.* a trust to make good diverse breaches of trust committed by the settlor.<sup>41</sup>
- (d) Where the benefit intended for the creditors is not to take effect until after the debtor's death, and the property, subject to the trust for payment of debts, is conveyed by way of bounty to a third person, the creditors, upon the death of the debtor, without revoking these dispositions, become *cestui que* trust under the deed. The trust until then is conditional.<sup>42</sup>
- (iii) Trusts for advancement of purposes—public or private—which are not charitable *e. g.* trusts for the maintenance of specified horses and dogs or for the promotion of yachting or for the maintenance of settlor's tomb.<sup>43</sup>

Such trusts are quite valid provided they do not tend to perpetuities. But it is difficult to see who can enforce it because a horse or a dog cannot come into court by his next friend and compel the execution of trust. So if the trustee does not carry out the purpose, no one enforce it and the property would go back to the legal representatives of the settlor. But if he chooses to carry it out his legal representatives cannot prevent it.

Ashburner<sup>44</sup> has expressed the view that "the use of the 'trust' in this connection is hardly proper" and this is, of course, true in reference to its characteristic of being unenforceable but if the trustee chooses to carry out the object the transaction can stand only as a trust. In such cases the trust is permissive instead of its being imperative or obligatory.

39. *Mackinnon v. Stewart*, (1850) 1 Sim. (N. S.) 76.

40. *Acton v. Woodgate*, (1833) 2 My & K. 493.

41. *New Prince & Garrards Trustee v. Hunting*, (1897) 2 K. B. 19.

42. *Synnot v. Simpson*, (1854) 5 H. L. C. 121.

43. See next Chapter.

44. Ashburner's *Principles of Equity*, 2nd ed., p. 92.

## CHAPTER XXII

### CHARITABLE TRUSTS

Charitable trusts (or public trusts as these are also called) with its counterpart—Private trusts have been explained earlier in connection with the division of trusts according to the objects of or the beneficiaries under a trust. Private trusts concern only individuals or families for private convenience and support. Charitable trusts are for charities or for the general public benefit. The essential features of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general and often changing and fluctuating in their individual numbers. It is, however, generally very difficult to decide whether any particular trust is private or charitable. A simple demarcation between the two may be made through the following division :

“every lawful trust, whatever may be the objects it is intended to benefit, is a private trust unless the object is the advancement of a purpose *regarded by the law* as for the general benefit of the community.”<sup>1</sup>

Proceeding in this way, the proposition is reduced to this : What are those objects which the law regards charitable or for the general benefit of the community ? In other words : what are those objects, a trust for which shall, in law, be classed or treated as a charitable trust ?

The term ‘charity’ has a technical meaning in English legal literature and is, indeed, as Lord Wright put it, “a word of art, of precise and technical meaning”<sup>2</sup> and the first useful observation that need be made in connection with the investigation is that the popular meaning of charity does not coincide with its legal meaning. A comes across and is moved by the condition of Y, a stranger, a beggar or in distress otherwise and gives X Rs. 5,000/- in trust for the maintenance or education of Y. This is as clearly a charitable object in the popular sense as it is not the legal sense. It has, accordingly, been observed by Lewin that “the legal meaning and the popular meaning of the word ‘charitable’ are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning of that word.”<sup>3</sup> The legal significance is clearly narrower than the popular.<sup>4</sup>

A charitable object in law has three<sup>5</sup> characteristics :

- (i) **Indefiniteness.**—Charitable uses, in the language of English Law are simply a class of public uses. To be public—that is to benefit indefinite individuals—is essential to the legal idea of charity. It is this characteristic of indefiniteness that distinguishes public from private uses, and it is upon this that whatever is necessarily peculiar and anomalous in the legal treatment of public gift must depend.

1. Strahan’s Digest of Equity, 5th ed., p. 57.
2. National Anti-vivisection Society v. Inland Revenue Commissioner, (1948) A. C. 31 at p. 41.
3. Lewin on Trusts, 15 ed., p. 15.
4. Ibid.
5. See Mukhopadhyaya’s Perpetuities.

- (ii) **Meritoriousness.**—The purpose must be one for the benefit of the public or a section of the public and not for the private benefit of the donor or his family or of certain individuals. The object must be such that the donor may be regarded by the majority of mankind with the reverence due to a pious founder.
- (iii) **Perpetuity.**—A charitable trust is normally permanent or at least indefinite in duration.

In determining the legal meaning of 'Charity' the Courts in England have been guided by the illustrative list of charitable objects set out in the preamble to the Statute of Elizabeth.<sup>6</sup> Those purposes are charitable which the statute enumerates or which by analogies are deemed within its spirit and intendment. This Act was repealed by the Mortmain and Charitable Uses Act, 1888, but the list of Charities is repeated in Section 13 (2) of the latter Act.

The best description of charitable purposes within the Statute of Elizabeth, it is generally agreed, is to be found in Lord Macnaghten's judgment in *Commissioners of Income Tax v. Pemsel*:<sup>7</sup>

" 'Charity' in its legal sense comprises four principal divisions: (1) trusts for the relief of poverty; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; and (4) trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

Thus if the object of a trust falls within one of the above-mentioned divisions, it will be a good charitable trust provided the object is not immoral or contrary to law or public policy. The whole law of charitable uses seems to be in a state of flux and is incapable of being arranged and explained in a clear and definite form.

(1) **Trust for the Relief of Poverty.**—A gift for the benefit of poor persons generally or of a certain place or of a certain profession is a good charitable trust. Similarly, a gift for poor emigrants would be a good charitable trust, but it cannot be so in case the object is emigration generally<sup>8</sup> because the trustee might in the case use, without a breach of trust, the whole fund to enable rich persons to emigrate.

Poverty in this classification means not relative but absolute poverty. Thus it was held in *Re Drummond*<sup>9</sup> that a gift for the holiday fund of persons in the spinning department of a certain factory was outside the category of charitable trusts though the wages of the beneficiaries are small. It may at the same time be noted what Channell, J., said in *Mary Clarke v. Anderson*<sup>10</sup>: "...that the expression 'to poor persons' in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word 'poor' is more or less relative". A similar observation on the point was made by Viscount Simonds: "I do not question that there may be a good charity for the relief of persons who are not in grinding need or utter destitution.....relief connotes need of some sort, either need for a home or for the means to provide for some necessity or quasi-necessity....."<sup>11</sup>

In order that the above observations may not be misunderstood or be construed to be inconsistent with or opposed to the earlier observation on the

6. 43 Eliz. I. C. 4.

7. (1891) A. C. 531, 583.

8. *Re Sidney*, (1908) 1 Ch. 488.

9. (1914) 2 Ch. 90. See also *Baddeley v. Inland Revenue Commissioners*, (1953) Ch. 504.

10. (1904) 2 K. B. 645.

11. *Inland Revenue Commissioners v. Baddeley and others*, (1955) A. C. 572, 585.

point, it is necessary to add that the term 'absolute poverty' means indigence at or below a certain level depending on the state of the society in question. The submission is appreciably supported by the following observations of Evershod, M. R. : ".....poverty does not mean destitution, it is a word of wide and somewhat indefinite import ; it may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life and so forth."<sup>12</sup>

The fact that the persons to be benefited are the blind or orphans or widows is not of itself sufficient to make a trust for their relief charitable ; but as a rule, in the absence of anything to the contrary, the Court will construe such trusts as if the word 'poor' had been inserted before the word 'blind' etc.<sup>13</sup> The validity of a bequest as a charity "in favour of blind boys and blind girls of a particular locality" recently came in for adjudication in *In re Lewis*<sup>14</sup> and the objection was that the words in the Statute<sup>15</sup> "aged, impotent and poor" must not be read disjunctively so that poverty was an essential ingredient for the validity of such trusts. The decision<sup>16</sup> which proceeded on the clear premise that there was, in the bequest, no element of poverty whatsoever, was that the words should be read of disjunctively so as to constitute impotent persons as a class *per se* and that the bequest was accordingly good. The illogicality of the objection, it was pointed out, lay in its effect that poor persons would not then qualify unless they were aged and impotent. The reasoning seems to be unassailable but the case may create or introduce innovations in the settled law or conception on this point.

The object of trust will not be anytheless charitable because incidentally they benefit the rich as well as the poor. So in *Verge v. Somerville*,<sup>17</sup> a bequest for the benefit of the New South Wales soldiers returned from the 1914-18 war, though not confined to poor soldiers, constituted a valid charitable trust. Trusts for the benefit of even the poor relations of the settlor or a third person, though it can confer benefits upon particular individuals only, is a good charitable trust since it is for the public benefit that every class of poor should be provided for.<sup>18</sup> Though limited it has the essential characteristic of the class being indefinite and fluctuating which would not be so in case of heirs etc. Tudor in his book on 'Charities'<sup>19</sup> concludes that trusts for poor relations are valid unless their scope is confined to the statutory next-of-kin. The conclusion of the learned writer is not, however, limited to the relief of poverty of such relations but also for their education and it has been added that 'bequests for the education of the donor's descendants and kinsmen at a school or college' were valid. The Court of Appeal in *Re Compton*<sup>20</sup> expressly disapproved the view regarding the validity of such trusts and distinguished them from the other cases of poor 'relations' on the ground that there is a special quality in poverty which attaches a public character to a gift in relief of it, which does not attach to a gift for education. So the former may be confined to a family, the latter not. A trust, however, for the purpose of scholarships to poor boys with preference for 'founder's kin', would be a charitable trust because this is simply a method of choosing the beneficiary.<sup>21</sup>

12. *Re Coulthurst*, (1951) Ch. 661, 666.

13. *Thompson v. Corby*, (1860) 27 Beau. 649.

14. (1955) 1 Ch. 104.

15. Of Elizabeth, see preceding page

16. Following *In re Fraser*, (1833) 22 Ch. D. 327.

17. (1924) A. C. 496.

18. *Gillam v. Taylor*, (1873) L. R. 16 Eq. 581, ; *Re Scarisbrick*, (1951) Ch. 662.

19. 5th ed., p. 26.

20. (1945) Ch. 123.

21. See Lord Simond's Observation in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, (1950) A. C. 297, 306.



It has accordingly been held in *Gibson v. South American Stores Ltd.*<sup>22</sup> that a trust by a company for such of its necessitous employees and ex-employees and their dependents as the directors may decide, is a valid charitable trust; while in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*,<sup>23</sup> it was held that a trust for the education of the children of employees and ex-employees as the trustees may decide, did not satisfy the test of public benefit requisite to establish a trust as charitable and must, therefore, fail.

Dwelling upon the basis or justification of the 'poor relation' cases, Evershed, M. R., says :

"If the question of the validity of gifts of this character had come up for the first time in modern days I think it would very likely have been decided differently on the ground that their purpose was a private family purpose, lacking the necessary public character, but it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations on the faith that they were charitable, and many testators have, no doubt, been guided by these decisions.

"The explanation of the poverty cases<sup>24</sup> is that a much narrower object may in them be considered to work a public benefit than in other categories.....On the other hand, it may be that they simply must be regarded as a well-established anomaly."<sup>25</sup>

Reserving the opinion on the principle or validity of the poor relation cases and declining to extend the same to education or other cases, the House of Lords, to quote Lord Simonds, said :

"It would not be right for me to affirm or denounce or to justify these decisions (in the so-called poor relations cases). I am concerned only to say that the law of charity, so far as it relates to.....poverty in general, has followed its own line, and that it is not useful to harmonize decision on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House is to consider them."<sup>26</sup>

Quoting Lord Wright for the proposition that the House of Lords has no doubt power to overrule a long established course of decisions of the courts but such a course would be adopted in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law, it was added :

"I quote with respect those observations to indicate how unwise it would be to cast any doubt upon decisions of respectable antiquity in order to introduce a greater harmony in the law of charity as a whole."<sup>26</sup>

(2) **Trusts for the advancement of education.**—Under this head come gifts for the benefit, advancement and, propagation of education and learning (by means of teaching), e. g. founding schools, colleges etc. ; or the lecturerships and professorships therein or the award of scholarships, etc. The category is wide enough to include gifts for the development of drama and the art of

22. (1950) Ch. 177.

23. (1950) A C 297.

24. Quoting Hornman, J. from (1949) Ch. 572, 579, whose judgment was the subject-matter of appeal in this case

25. *Gibson v. South American Stores Ltd.*, (1950) Ch. 177, 194, 197.

26. *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, (1950) A. C. 297, 308.

acting for an annual school retreat, for the promotion of sport at an educational institute and for the encouragement of chess tournaments. But a gift for training and development of spiritualistic mediums, not being for the benefit of the public, is not charitable.<sup>27</sup> So also a gift for the mere pursuit of science will not be charitable unless some educational element can be discovered therein.<sup>28</sup> Education does not, however, mean academic education merely but any instruction calculated to improve the people mentally or morally. Thus a trust "for the protection and benefit of animals" is a good charitable trust.<sup>29</sup> But a trust for animals to be a charity must not be for the benefit of specific animals.<sup>30</sup>

(3) **Trusts for the advancement of religion.**—Examples of charitable trusts falling and upheld by Courts under this head are : gifts for the Church of England or to the Catholic Church, gifts for the building of a church ; for the repairing of parsonage houses ; for the support of a certain chapel ; for the vicar or curate of a certain place, for preaching an annual sermon on a certain day ; for the support of a burial ground ; to maintain the missionary establishment of a particular church among the heathen nations ; for the advancement of Christian religion among infidels.

"Within the pale of the Christian religion, shades of doctrine are immaterial. There are decided cases which show that trusts in favour of almost every sect in Christendom have been upheld. As regards non-Christian purposes, the law is not so clear. In *Straus v. Godsmid*,<sup>31</sup> a trust to enable Jews to practise their religion was upheld. The reports do not seem to furnish a case of a trust for Mahomedan purposes, but it is difficult to believe that a trust for building a mosque would not be held charitable. That there are limits beyond which the Courts are not prepared to go is shown by *Re Hummeltenberg*<sup>32</sup> and *Re Porter*,<sup>33</sup> where the gifts were for the establishment of a college for training spiritualistic mediums and for the maintenance of a masonic temple respectively; neither is charitable....."<sup>34</sup>

By a series of cases founded on *West v. Shuttleworth*,<sup>35</sup> it had been decided that gifts for performance of masses for the soul of a testator or other persons was illegal because they came within the Statute<sup>35a</sup> against superstitious use, and that, being for the private benefit of the donor or others and not charitable intent, they lapsed. It is now settled by *Bourne v. Kean*<sup>36</sup> that such gifts are valid.

(4) **Trusts for other purposes beneficial to the community.**—This head is very vague and it is, indeed, difficult to lay down any principle as to what constitutes a valid charitable trust for the purposes of general public utility. Andrews, L. C. J., says : "The authorities, whose number is legion, upon whether particular trusts fall within or without Lord Macnaghten's fourth category baffle all efforts on my part to reconcile them."<sup>37</sup>

27. In *re Hummeltenberg*, (1923) 1 Ch. 237.

28. *Re Ogden*, (1909) 25 T.L.R. 382.

29. In *re Wedgwood*, (1915) 1 Ch. 113.

30. In *re Dean*, (1889) 41 Ch. D. 552.

31. 8 Simons, 614.

32. (1923) 1 Ch. 237.

33. (1925) Ch. 746.

34. *Modern Equity* by H. G. Hanbury, 5th ed., pp. 228-229.

35. (1935) 2 My. & K 684.

35a. 1 Edw. 6 C. 14.

36. (1919) A. C. 815, where the whole course of decisions is reviewed. The point was, however, left open in *Gilmour v. Coates*, (1949) A.C. 426, 447, 454, 460.

37. *Trustees of Londonderry Presbyterian Church House v. Commissioners of Inland Revenue*, (1946) 27 T. C. 431, 446.

It may, however, be stated that the object must, in order to be charitable under this residual class, come, if not within the words of the Statute of Elizabeth, at any rate within the spirit and intention of it.<sup>38</sup> Examples of good charitable gifts under this head are: a gift for the improvement of a certain city; a gift to be applied in forming works for supplying the inhabitants of a certain place with spring water; a gift for the maintenance of a village club or reading room; a gift for the support of a certain botanical or other public garden; a gift for the preservation of places of historic interest; a gift for training selected boys from a training ship as officers in the Royal Navy or Mercantile marine; a gift for homes of rest; a gift for the sick and wounded etc. Similarly, gifts for the welfare of animals in general or class of animals as opposed to gifts for specific animals, are charitable<sup>38a</sup> on the ground that it tends to promote feelings of humanity and morality among the public by checking the innate tendency of cruelty towards them. It was by an extension of this principle that it was held in *In re Foveaux*<sup>39</sup> that a trust for the suppression of vivisection is a good charitable trust although it was felt that the suppression of vivisection is to be more likely for the disadvantage than for the benefit of the public. This decision was later overruled by the *House of Lords in National Anti-vivisection Society v. Inland Revenue Commissioners*<sup>40</sup> wherein it was held<sup>41</sup> that a society having as its object the total suppression of vivisection is not "a body of persons established for charitable purposes only", on the ground:

- (a) that any assumed public benefit in the advancement of morals would be far outweighed by the detriment to medical science and research and consequently to public health;
- (b) that the main object of the society was political—which, Lord Wright said, was not confined to party political measures—being for the promotion of legislation.

The most important observation and a material contribution to the concept of charity is the following:

".....the whole tendency of the concept of charity and a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class."<sup>42</sup>

The Statute of Elizabeth expressly mentions as charitable objects architectural and constructional works and gifts in aid of the public revenue; and gifts for such purposes would also be charitable trusts under his head.

It need, on the other hand, be noted that this category does not include every object of a general public utility. As observed by Kakewitch, J., "Any man who spends his income, whether large or small, benefits the community by putting money in circulation. But in order to find that a gift is charitable, the court must come to the conclusion that the benefit of the community is the direct, and not the remote, object of the gift."<sup>43</sup> And the test laid down by the distinguished judge for upholding the validity of a gift as charitable

38. *Re Macduff*, (1896) 2 Ch. 451.

38a. *In re Wedgwood*, (1915) 1 Ch. 113.

39. (1895) 2 Ch. 501.

40. (1948) A. C. 31.

41. Lord Porter dissenting.

42. Per Lord Wright at p. 49, *ibid*.

43. *In re Nottage*, (1895) 2 Ch. 649, 653.

under the head is whether "it is by itself, directly and as its necessary and intended result, beneficial to the community".<sup>44</sup> It has, accordingly, been held that a gift for the encouragement of mere sports or for promoting simply "the religious, moral, social and recreative"<sup>45</sup> life of the people, could not be upheld as a charitable trust.

As Lindley, L. J., put it : "I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting or any other healthy exercise or recreation ; but if it had been the idea of lawyers that a gift for the encouragement of such exercise is charitable, we should have heard of it before now."<sup>46</sup> Similarly, Viscount Simonds said : The moral, social and physical well-being of the community or any part of it is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include purposes which the law regards as charitable."<sup>47</sup>

If, however, such gifts independently or otherwise fall within the first three categories, they would be good charitable gifts. Upholding, therefore, a bequest for building courts and providing a prize for some event in athletic sports in a school, Eve, J., observed : "It is a gift to an institution which admittedly is a charity within the Statute of Elizabeth.....The object of this charity is education, in the widest sense.....No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind. It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily occupation..."<sup>48</sup>

It is the same with gifts for the purpose of promoting sports in the armed<sup>49</sup> or the police<sup>50</sup> forces on the ground<sup>51</sup> that it is a direct public benefit to increase the efficiency of the forces in which the public is interested not only financially, but also for the safety and protection of the country or the preservation of public order. Such gifts must, however, be aimed and directed exclusively towards increasing their efficiency, a gift for the purpose of providing recreation or 'general pastime' in the forces would not be charitable.<sup>52</sup>

Whether a gift is charitable is a question to be decided by the court on the evidence before it in each case ; the opinion of the donor that his gift will benefit the public is not material.<sup>53</sup>

The test of charity may vary from generation to generation and what is charitable in one age may not remain so in another and *vice versa*<sup>54</sup> and Lord Wright went to the length of imagining or forecasting that "trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value".<sup>55</sup>

"The...law of charity has been built up not logically but empirically"<sup>56</sup>

44. In re Nottage, (1895) 2 Ch. 649, 653.

45. Inland Revenue Commissioners v. Baddeley and others, (1955) A. C. 572.

46. (1895) 2 Ch. 649, 655.

47. (1955) A. C. 572, 589. See also Trustees of Londonderry Presbyterian Church House v. Commissioners of Inland Revenue, (1946) 27 T. C. 431.

48. In re Mariette, (1905) 2 Ch. 284, 288.

49. In re Good, (1905) 2 Ch. 60.

50. Inland Revenue Commissioners v. City of Glasgow Police Athletic Association, (1953) A. C. 380.

51. In re Gray, (1925) Ch. 362, per Farwell, J.

52. (1953) A. C. 380 (vide foot-note no. 50).

53. Re Humbleton, (1923) 1 Ch. 237.

54. National Anti-vivisection Society v. Inland Revenue Commissioners, (1948) A. C. 31.

55. Ibid.

56. Gilmour v. Coats, (1949) A. C. 426, 443, per Lord Simonds.

and "no one who has been versed.....in this difficult and very artificial branch of the law can be unaware of its illogicalities".<sup>57</sup> The off-repeated view of the judges is that it "is probably impossible to define what is a charitable bequest ; and it is certainly not advisable to do so"<sup>58</sup> and Lord MacDermott was perhaps not conscious of its feasibility and admissibility when he voiced the view that it "is a long cry to the age of Elizabeth and.....what is needed is a fresh start from a new statute."<sup>59</sup> The judges have, therefore, instead of drawing a line to separate charitable gifts from gifts which are not charitable, adopted the only safe<sup>60</sup> or practicable course of determining whether the particular gift in issue does or does not fall within charitable gifts, and for most cases it would be well to recall "the answer of a great judge that, though he knew not when the day ended and night began, he knew that mid-day was day and mid-night was night."<sup>61</sup>

### INDIAN LAW

The word 'charitable' has acquired<sup>62</sup> in India the same technical meaning which it bears in the Statute of Elizabeth referred to above. This is supported by the illustrations of religious or charitable uses given under Section 118 of the Indian Succession Act, 1925 (re-enacting Section 105 of the same Act of 1865). Further, the classification of charitable purposes under Section 18 of the Transfer of Property Act, 1882, corresponds more or less to that noted in the preceding paragraph. It may be split as follows :—

Transfer of property for the benefit of the public (i) in the advancement of religion ; (ii) in the advancement of knowledge ; (iii) in the advancement of commerce, health and safety ; (iv) any other object beneficial to mankind.

It need be mentioned that Indian law has taken out religious purposes from charitable purposes as generally understood and as explained above. Thus charitable purposes, as defined by Section 2 of the Charitable Endowments Act, 1890, includes relief of the poor, education, medical relief and the advancement of any other object of general public utility *but does not include* a purposes which relates exclusively to religious teaching or worship which is subject to and governed by the Religious Endowment Act, 1863.<sup>63</sup> Act XIV of 1920 which applies to both the religious and charitable trusts has accordingly been named as the Charitable and Religious Trusts Act. The division is only nominal and there is no difference in effect, in the position or privilege of the two.

That the meaning and scope of the term 'public or charitable' except in so far as permissible under or modified by a personal law, is very much the same in India as it is in England is best shown by the sense in which this term has been interpreted for the purposes of Section 4 (3) of the Indian Income Tax Act, 1922, which exempts a religious or charitable trust or the income therein or gifts thereto etc. from being liable to the payment of income-tax.

57. *Oppenheim v. Tobacco Securities Trust Co Ltd.*, (1950) A. C. 297, 307.

58. *In re Nottage*, (1895) 2 Ch. 649, 656, per Rigby, L. J.

59. *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, (1950) A. C. 297, 319.

60. *In re Nottage*, (1895) 2 Ch. 649, 656, per Lopes, L.J.

61. Quoted by Lord Simond, L. C., in *Chapman v. Chapman*, (1954) A.C. 429, a case on a different subject, see p 291 *infra*.

62. *University of Bombay v. Municipal Commissioner of Bombay*, 16 Bom. 217, 266.

63. The Indian Income-tax Act, 1922—Section 4—adopts the same classification ; the exemption available to religion does not, however, apply to private religious purposes.

For the purposes of construing the words "religious or charitable purposes" in the Income Tax Act, 1922, it is quite unnecessary<sup>64</sup> to investigate the meaning of the words in the particular system of jurisprudence that may be followed by the assessee. The proper rule is, in the case of such a general Act, to construe it according to the jurisprudence of the country wherein it was drafted. It has, accordingly, been held<sup>65</sup> that the word 'charitable' in the Income-tax Act has a technical significance other than the meaning which it bears in common parlance. Every institution whose object is to benefit the public or a section of the public is not necessarily 'charitable'. Before an institution can be held to be charitable there must be an element of altruism ; that is to say, the beneficiaries must not be able to *claim* the benefit." This condition is wanting in the case of a mutual association, like the Chamber of Commerce, whose ostensible object is to provide facilities of trade and to improve business and whose whole idea is that the particular members composing it should be benefited. Such an association is, therefore, not a 'charitable' institution.

Where a newspaper is started with the object of supplying the province with an organ of educated public opinion, it should *prima facie* be held to be an object of general public utility.<sup>66</sup> But a trust for the benefit of a particular political party or for the advancement of particular political opinions would not be a public or charitable trust.<sup>67</sup>

One notable distinction between the early English and Indian law on the point was with regard to trusts for superstitious uses. The position may very precisely be started through the following observations of *Daver, J.*, in the case of *Jamshed Ji v. Soonabai*<sup>68</sup> :

".....the English Law of Mortmain does not extend to British India. For this the Privy Council decision in the case of *Mayor of Lyons v. East India Company*,<sup>69</sup> is a very clear authority. In England, the Statute 1 of Edward VI, Ch. 14, known as 'The Act for Chantry's Collegiate' made certain existing religious trusts void and on the analogy of that Statute all trusts that followed the passing of that Statute and were analogous to those declared void by it, were also held to be void,<sup>70</sup> for example, a bequest for the performance of masses, according to the forms of the Roman Catholic Church, whether the masses be for the testator's own soul or for souls generally. This policy of the law is spoken of as the Doctrine of Superstitious Uses, and it is well established by a series of decisions that this doctrine is not extended to India has no application to trusts, relating to religion, created in India."

It was, on the same principle, held in *Dinsha Petit v. Jamsetji*<sup>71</sup> that a permanent bequest by a Parsi for the purpose of Mukta ceremonies is a trust for public purposes of a religious nature because such ceremonies include prayers for the spiritual welfare of all Zoroastrians and tend to the advancement of Zoroastrian religion.

64. *Umar Baksh v. Commissioner of Income-tax, Punjab*, A. I. R. (1931) Lah. 578. See also *Commissioner of Income-tax v. Humayun Raza*, A. I. R. (1936) Pat. 532.

65. *Chamber of Commerce, Hapur v. Commissioner of Income-tax*, U. P., (1936) A.L.J. 1085 at p. 1093.

66. *Tribune Press Trustees, Lahore v. Income-tax Commissioner*, 66 I. A. 241.

67. *In re Tilak Jubilee Trust Fund*, A. I. R. 1942 Bom. 61.

68. *Jamshedji v. Soonabai*, 33 Bom 61.

69. *Mayor of Lyons v. East India Co*, 1 M. I. A. 175.

70. See on this point p. 247 post.

71. (1909) 33 Bom. 509.

*Tolada Municipality v. Charity Commissioner*,<sup>71a</sup> although a case under the Bombay Public Trust Act of 1950 is important from general point of view as well. A trust for either a religious or charitable purpose or for both by the express words of the definition is a public trust. The Supreme Court observed, "we are unable to agree with the learned Assistant judge that *sadhus*, religious mendicants and visitors to the *samadhi* of Nagababa are not a section of public. They have a common bond of veneration for the *samadhi*. The beneficiaries of trust are an uncertain and fluctuating body of persons forming a considerable and section of public and answering a particular description and the facts that they belong to a religious faith or sect of persons of a certain religious persuasion does not make any difference in the matter."<sup>71b</sup>

The property entrusted to the Municipality for providing shelter to "*sadhus*", saints and religious mendicants; "the purpose, in our judgment is religious and charitable within the meaning of S. 2 (13) of the Act" at p. 421. It was further held that all the properties vesting in the municipality under the Municipal Act must be held and managed by it as a trustee subject to the provisions of the Act. But there is nothing in that Act or in the general law which prevents a Municipality from accepting a trust in favour of a section of the general public in respect of property transferred or authorises the municipality after accepting a trust to utilise it for its own purpose in breach of the trust.

In *N. S. R. Mudaliar v. M. S. V. Mudaliar*,<sup>71c</sup> a case of mixed trust for charity and non-charitable purposes, *viz.* maintenance and education of descendants of the predeceased adopted the Supreme Court on a construction of the trust deed held that the predominant and overwhelming intention of the settlor was to benefit the charities and provide for the same not only by making the expenses for the charities as the first and foremost direction but also by providing for accumulation of income and purchase of property out of the said accumulation only for the purpose of charities. The power given to the trustees to stop maintenance and education expenses was it was observed a complete negation of the contention that there were the dominant purpose of the settlement.

### Hindu Law.

"In dealing with the Hindu endowments we are restricted by any of the artificial definitions (referred to above). The words may be taken in their modern popular sense of property dedicated for religious or charitable purposes."<sup>72</sup>

"What are purely religious purposes and what religious purposes will be charitable must be decided according to Hindu Law and Hindu notions."<sup>73</sup> "To the extent that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastraic basis so far as the Hindus are concerned."<sup>74</sup> The following have, *inter alia*, been recognized and upheld by the Courts to be public, charitable or religious purposes.

Establishment and worship of an idol or maintenance of a temple or priests; feeding of Brahmans and the poor; performance of religious ceremonies like

71a. A. I. R. 1968 S. C. 418.

71b. *Ram Swaroopdasji v. S. P. Sahi*, (1959) Supp. 2 S. C. R. 583.

71c. A. I. R. 1970 S. C. 1839.

72. *Saraswathi Endowments*, p. 3.

73. *Mayne's Hindu Law*, 11th ed., p. 192; *Fatma Bibi v. The Advocate-General of Bombay*, 6 Bom. 42.

74. *Saraswathi Ammal v. Rajgopal Ammal*, 1954 A. L. J. 136 (S. C.).

*sradha*, *durga puja* and *lakshmi puja*; <sup>76</sup> building wells and *hawadas*, <sup>76</sup> (troughs) · establishing or maintaining *dharamshala* and hospitals; establishing or maintaining school or universities. Similarly, a devise of property to executors upon trust to distribute the same among the testator's poor relations, dependants and servants would be a valid <sup>77</sup> public or charitable gift. So also it was held by the Patna High Court in *Nakshetra Mali v. Brajasunder* <sup>78</sup> that if a Hindu directs by his will that the executors should pay a sum of money to the relief of any poor and deserving *karan* family or families or individuals in the shape of necessities of life in times of distress, medical or educational aid, help for marriage of daughter and such other deserving cause it would be a valid charitable bequest since the words were sufficiently certain and descriptive to indicate the class of persons whom the testator intended to benefit.

In *Dwarkanath v. Burroda*, <sup>79</sup> the High Court of Calcutta expressed a doubt as to whether gifts to Pandits holding *tolls* for learning in the country at the time of *Durga Pujah* or for the reading of *Mahabharat* or *Pooran* or for the prayer of God during certain months are valid.

The English Law relating to superstitious uses does not apply to Hindu religious endowments. Thus a gift in favour of an idol, or for the performance of the worship of a deity is valid according to the Hindu law though it would not have been valid according to English law. <sup>80</sup> Dispositions for religious purposes are highly favoured by Hindu Law and the deduction of property by a Hindu to a deity is not only lawful but commendable in a high degree from the Hindu point of view.

It has been held by the Madras High Court through a series of decisions, <sup>81</sup> which were affirmed by Supreme Court <sup>82</sup> that the building of *samadhi* or tomb over the remains of a person and the making of provision for the purpose of *gurupuja* and other ceremonies in connection with the same cannot be recognized as charitable or religious purpose according to Hindu Law. Cases of Hindu saints having been defined and worshipped, however, stand on a different footing from that of an ordinary private individual who is entombed and worshipped thereat and such dedications may be valid. <sup>82a</sup>

In *Tolada Municipality v. Charity Commissioner*, <sup>82b</sup> the Supreme Court held that property including a *Dharamshala* for providing shelter to "*sadhus*, saints and religious mendicants" would constitute a public trust for a religious and charitable purpose. "We are", it was observed, "unable to agree with the learned Assistant Judge that *sadhus*, religious mendicants and visitors to the *samadhi* of *Nagababa* are not a section of the public. They have a common bond of veneration for the *samadhi*. The beneficiaries of the trust are an uncertain and fluctuating body of persons forming a considerable section of the public and answering a particular description, and the fact that they belong to a religious faith or sect of persons of a certain religious persuasion does not make any difference in the matter."

75. *Prafulla v. Jogendranath*, (1905) 9 C. W. N. 528; *Lakshmishankar v. Vajjnath*, (1882) 6 Bom. 24.

76. *Jamnabai v. Khimji*, 14 Bom. 1.

77. *Manorama v. Kalicharan*, (1903) 31 Cal 166.

78. A. I. R. 1933 Pat. 647.

79. (1879) 4 Cal 443.

80. *Juggut Mohini v. Sokheemoney*, (1874) 14 M. I. A. 289 at pp. 301-302.

81. *Kunhamutty v. T. A. Musaliar*, 58 Mad. 204; *A. Draiviasundaram Pillai v. N. Subramania Pillai*, I. L. R. 1945 Mad. 854; *Veluswami Goundan v. Dandopani*, (1946) 1 M. L. J. 354.

82. *Saraswathi Ammal v. Rajagopal Ammal*, 1954 A. L. J. 136.

82a. *Ibid.*

82b. A. I. R. 1968 S. C. 418.



Special reference need, on the point, be made of the decision of the Madras High Court in the case of *Venkatanarasimha v. Subba Rao*.<sup>83</sup>

In this case, a Hindu executed a will by which he purported to create a charitable and religious trust by providing that a sum of Rs. 400 should be spent every year out of his estate "either for the spread (*adhiyirithi*) of the Sanskrit language or for the spread of the Hindu religion or for both". It was held that the gift must fail for uncertainty in object. The conclusion was arrived at by their Lordships Spencer and Devadoss, JJ., constituting the Division Bench on different grounds though the trust for the spread of Hindu religion being vague and indefinite was a common ground for the decision.

It was held by Spencer, J., that the trust for the promotion of the knowledge of the Sanskrit language was a valid charitable bequest but that for the spread of Hinduism was too vague to be upheld or enforced by the Courts. But since the trustees had been given an absolute discretion to spend the whole sum for either or both of these objects, the whole gift was void in law and unenforceable.

It was, on the other hand, held by Devadoss, J., that both as regards the spread of the Sanskrit language and the spread of the Hindu religion, the trust was void for indefiniteness of its objects.

Their Lordships were mainly, if not exclusively, guided by the decisions in English cases on the point to which they could not be restricted in respect of Hindu endowments but even according to the English Law the decision, it is submitted with great respect, goes a little too far and it is difficult to agree with the reasonings for invalidating the gift for the spread of Hindu religion.

The relevant clauses in the will were as follows :—"A sum of Rs. 400/- should be spent every year out of my estate, either for the spread (*abhiyirithi*) of the Sanskrit language or for the spread of the Hindu religion, or for both. The said sum must be a charge on my estate. The executors must make the arrangement necessary therefor to have the same conducted as of the then existing trustees of the Rajahmundry Hindu Samaj may deem fit.

"Further it is my desire that the Vedas relating to my *sakha* (branch) should be encouraged. And for that purpose, it is my desire that chiefly a general Sanskrit or Vedic or Oriental Library should be established at Rajahmundry, in my name. The executors must make the arrangements necessary therefor."

There is not, it appears from these provisions, anything indefinite or vague at least in so far as the 'spread of Sanskrit language' is concerned and the finding of Spencer, J., on this point, it is submitted, is the correct one.

In so far as the provision for 'the spread of Hindu religion' is concerned there is, indeed, a certain amount of indefiniteness or uncertainty with regard to the mode in which the object may be realized but the object itself, viz. 'spread of Hindu religion' is as certain and definite as it can or in law ought to be. The position is the same and the defect or difficulty no greater than in cases of bequests for 'the relief of poverty' or 'for the advancement of education' and such defects or uncertainties are, in accordance with the well-established favour to a public or charitable trust in contrast to a private trust, not fatal to the trust. The decision in this case would perhaps have been different if :—

(i) the doctrine of *cy pres*, which appears to have been altogether out of

the view or consideration of their Lordships in this case, had been duly applied ;

- (ii) the term 'public or charitable' had not been given a restricted meaning in this case. It was, for instance, observed by Spencer, J., that, "If ..... we hold that the scheme, should be directed to the best means for inculcating the peculiar sectarian doctrines of the testator's own branch of the Hindu faith, then it may reasonably be doubted whether this purpose is such a public one as Section 92 of the Code (of Civil Procedure) was intended to cover." It is submitted that a trust would be a good charitable trust whether it is for the advancement of a particular religion or only a certain sect of it and there is nothing in the provision under Section 92 of the Code of Civil Procedure, *viz.* "an express or constructive trust for public purposes of a charitable or religious nature" or in any other authority—English or Indian—to restrict the import of the expression 'charitable' in this respect. It was, for instance, held by the Allahabad High Court in the case of *Mahant v. Darshan*<sup>84</sup> that a trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of particular sect and the propagation of the tenets of that sect.

In *Venkata Krishna v. Sub-Collector, Gangole*,<sup>84a</sup> after reviewing the relevant authorities on the point, the Supreme Court held that under Hindu law a tank can be an object of charity and when a dedication is made in favour of a tank, the same is considered as a charitable institution. The question whether it can also be considered as a juristic person was, however, left open.

The case could be disposed of on the strength of first finding. The finding on the second point even otherwise ought to be confined to the facts of this case. Its extension in general may, it is submitted create difficulties. The decision does not moreover appear to be consistent with the earlier decision of the Supreme Court under the same fact in *Taloda Municipality v. Charity Commr., Bombay*.<sup>84b</sup>

- (iii) the objects of the trust in question were not identified or connected with those of the Rajahmundry Hindu Samaj. The objects of the Samaj were the diffusion of the principles of Hinduism, the study of Hindu Civilization and, in general, the advancement of the Hindu community. Some of the objects falling under the above categories could not, as observed by Devadoss, J., be charitable or religious. But the object specified by the testator, *viz.* 'spread of Hindu religion', as is clear from the provisions in the will, was scientific and distinct from that of the Samaj and the trustees of the Samaj had to choose objects within the will of the testator and not from the objects of the Samaj itself.

In *Charity Commr., Bombay v. Sringeri Math*,<sup>84c</sup> a case under the Bombay Public Trust Act (29 of 1950) for the purpose of the registration under that Act of the Shankaracharya's Math at Nasik Panchawati, the Supreme Court while answering negatively the question raised held, (i) that it is the situs of the principal math (which Sringeri Math in this case was in Mysore) which will determine the applicability of the Act to the maths which are adjuncts of a subordinate to the principal math and (ii) that in the Nasik no religious instructions are imparted and no spiritual service is rendered to any body of

84. (1912) 34 All. 468.

84a. A. I. R. 1969 S. C. 563.

84b. A. I. R. 1968 S. C. 418.

84c. A. I. R. 1969 S.C. 566.

disciples. Further no member of the public is allowed to enter the place of worship without permission although worship is carried out by the Pujaris according to vedic usage.

For the first part of its finding the Supreme Court relied on its earlier decision on the point and as to the second it simply affirmed the judgment of the High Court without any discussion of the relevant law in relation to the facts of this case. The Act defined 'Public Trust' to mean an express or constructal trust for either a public religious or charitable purpose or both and includes a temple, a math, a dharamada or any *wakf* other religious or charitable endowment and a society formed either for a religious or charitable purpose of or both and registered under the Societies Registration Act, 1860. 'Temple' is defined in the Act to mean "a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as a place of public religious worship and dedicated to or for the benefit of or uses as of right by the Hindu Community or any section thereof a place of public religious worship."

#### Mohammedan Law.

Under the Mahammedan Law in India, the term 'charity' has a more general import than under the English Law or the Hindu law. Here the trust is charitable even though in favour of the descendants or relations, provided only that the ultimate residue is to go to charity, the remoteness being immaterial.

In the case of *Abul Fateh Mahomed v. Rasmaya*,<sup>85</sup> it was held by the Privy Council that if the primary object of the *wakf* was the aggrandisement of the family and gift to charity was illusory whether from its uncertainty or remoteness, the *wakf* would be invalid and no effect could be given to it. This decision raised considerable alarm and caused considerable dissatisfaction among the Mohammedans. A representation was, therefore, made to the Government of India and it led to the passing of the Mussalman Waqf Validating Act, 1913. It enacted that no *wakf* shall be deemed to be invalid merely because the benefit reserved—expressly or impliedly—therein for the poor or any other purpose recognized by the Mahomedan Law as a religious, pious or charitable purpose of a permanent character is postponed until after extinction of the family, children, or descendants of the person creating the *wakf*. This Act was not retrospective but was made so by the Musalman Waqf Validating Act of 1930.

It is on the strength of this principle or the provisions of this Act that many a gift which are not public or charitable according to the principles of English Law or even the Hindu Law have been recognised as such and upheld under the Mohammedan law. It need, however, be noticed that such public or charitable trusts under Mohammedan Law do not receive all the advantages or favours available to such trusts in the Indian or the English system.

Gifts for the following objects have been recognized and upheld by the Courts in India as a valid public or charitable trust under the Mohamedan Law; Distribution of alms to or the funeral expenses of the poor and to assist them to perform *haj*; annual *fatiha* of the wakif,<sup>86</sup> endowing a teacher for a school or college; the salary of an *imam* or leader of prayers; aqueducts, bridges and caravan *serais*; building or repairs of mosques or *imambaras*; celebration of Moharrum and its connecting ceremonies; sinking wells or tanks; reading of

85. L. R. (1894) 22 I. A. 76.

86. *Mazhar Husain Khan v. Abdul Hadi Khan*, 53 All. 400,

Quran in public places and also at private houses ; payment of wakif's debts etc. with ultimate charity to the poor.<sup>87</sup>

On the other hand, gifts for the following objects have not been recognized to be a valid public or charitable trust under the Mahomedan Law as available in India :

Payment to lawyers,<sup>88</sup> maintenance of a private tomb as distinguished from the tomb of a saint.<sup>89</sup>

The ambit of "charity" or "charitable purpose" in reference particularly to Mohammedan Law came up for consideration before the Supreme Court in *Sagdul Rabbi v. State of West Bengal*.<sup>89a</sup> The case related to and involved the interpretation of the provisions of the West Bengal Estates Acquisition Act 1953 (1 of 1954). The following observations are, however, of general import and support the legal position as enunciated above :

"After the passage of these two Acts (Waqf Validating Acts) wakfs, in which the object was the aggrandisement of families of wakifs without a presence of charity in the ordinary sense, became valid and operative. But the intention of the validating Act was not to give new meaning to the word "charity" which in common parlance is a word denoting a giving to some one in necessitous circumstances and in law a giving for public good. A private gift to one's own self or kith and kin may be meritorious and pious but is not a charity in the legal sense and the courts in India have never regarded such gifts as for religious or charitable purposes even under the Mohammedan law.

"We do not say that English authorities should be taken as the guide as was suggested in some of those cases at one time (Referring to the provisions of the statute of Elizabeth and the Indian Income-Tax Act and to the observation of Sir George Rankin in *Tribune* case,<sup>89b</sup> 'intended to convey the same caution about English cases which we have sounded here, it was added). The Judicial Committee did not intend to lay down that the words of a statute so peruse in its definition should be rendered nugatory by leaving room for inclusion in "charitable purposes" objects which by no means could be charity in the generally accepted legal sense. No doubt the definition which is common is not exhaustive and leaves scope for addition but it does not make for enlargement in directions which cannot be described as 'charitable'."

Whatever may be the system of law—general or any of the personal laws—it is clear that the question whether a particular object is of general public utility so as to be a charitable purpose is not to be decided by what the settlor or testator considered to be beneficial to the public. The Court has a responsibility in coming to a finding on the point according to its requirements in law and there is nothing in law to discharge the Court of its responsibility.<sup>90</sup> Similarly a gift for such purposes as particular individual or individuals may consider to be charitable, would not be a good charitable purpose although a gift for such charitable purposes as the trustees may think fit would be good, because the trustees would, in such cases, be bound to keep within the ambit of charity

87. *Lachmipat Singh v. Amir Alum*, 9 Cal. 176.

88. *Yusuf Khan v. Misal Khan*, 73 I. C. 99.

89. *Kalewala v. Nazeerudin*, 18 Mad. 201.

89a. A. I. R. 1965 S. C. 1722.

89b. A. I. R. 1939 P. C. 208.

90. *Tribune Press Trustee, Lahore v. Income Tax Commissioner*, 66 I.A. 241.

and if they go beyond the legal boundary, they can be controlled by the Court.<sup>91</sup> When the question is whether the endowment is real or fictitious the mode of dealing with it by its donors and successors would be an important element for consideration.<sup>92</sup>

### DISTINCTION BETWEEN CHARITABLE AND PRIVATE TRUSTS

Trusts in favour of charities are, for the most part, subject to the same rules as private trusts, but there are important and material distinctions between the two which may be considered under the following six heads :

1. As to *cy pres* doctrine.—The doctrine of *cy pres* applies to charitable trusts but has no application to private trusts.

The word *cy pres* means 'near', 'next to' or 'as near as may be'. The doctrine of *cy pres* means that wherever the execution of a charitable trusts in the way expressed by the settlor is impossible or becomes impracticable, the gift will not fail but the Court will execute it *cy pres*, i. e. as nearly as possible to the purpose desired or intended by the settlor.

Thus where property was given to Kent County Hospital and there was no hospital having precisely that name, it was, under the circumstances, held that a general hospital must be presumed to have been intended and the property was applied accordingly.

A private trust, on the other hand, would in similar circumstances fail altogether without there being any effort by the Court to reach or realize the object of the bounty as best or as near as it may be possible.

In the above the Supreme Court while rejecting the claim for the increase in maintenance allowance to private beneficiary in a mixed trust, served. "The *cy pres* doctrine applies where a charitable trust is initially impossible or impracticable and the court applies the property *cy pres*, viz. to some other charities as nearly as possible, resembling the original trust. In the present case, the maintenance and education expenses are neither charitable trusts nor similar objects of charity."

The application of this doctrine may be called for in the following three classes of cases :

- (i) Where a general charitable purpose is expressed but the author of the trust has not expressed or has failed to express with sufficient distinctness the specific modes by which it is to be carried out. This will mean a good charitable trust and will be carried out by the Court.

This class of cases is best illustrated by the facts and the decision in the case of *Re White*,<sup>93</sup> where the testator gave the whole of his property "to the following religious societies" and there was a blank for those names. The Court of Appeal held that the testator had dedicated his property to religious purposes in general and that *prima facie* every religious purpose is a charitable purpose.

Similarly, if the donor evidences a clear and definite intention of charity but entrusts the specific mode of achieving the object to the choice of the trustee and if the trustee dies without having made the choice, the gift will not fail but will be applied *cy pres*. The donor, in such a case, shows

91. In re Tilak Jubilee Trust Fund, A. I. R. 1942 Bom 61.

92. Chaturbhuj Singh v. Sarda Charan Guha, (1932) 11 Pat. 70'.

93. (1893) 2 Ch. 41.

himself or herself, as Lord Eldon put it, in *Moggridge v. Thackwell*<sup>94</sup>—“saturated and satiated with the idea of charity and yet not to have had mind enough to determine upon the particular objects”—and it is for the Court to give effect to the wishes of the donor.

- (ii) Where the author of the trust has made a gift to a particular charity but that gift is or becomes incapable of taking effect.

In such cases, the applicability of the doctrine of *cy pres* would depend on the question whether, from the specific gift to the particular charity, an inference can be drawn of a general charitable intention or purpose. If the settlor's intention is not specifically and exclusively to benefit a particular body or institution but to advance the objects which the body or institution in question was to carry out, in other words, where the object specified was simply a mode or sample for fulfilling or carrying out his general object or bounty, the gift would be administered *cy pres*. If, on the other hand, the gift is in form for a particular object specifically as also exclusively and no paramount general intention is shown therein, the failure of the particular gift will result in the total failure of the gift.<sup>95</sup> Whether or not there is the requisite intention for the operation of this doctrine would depend upon the construction of the trust-deed and other relevant facts and circumstances.

Thus where the testator has made a provision for X or Y in case the particular charity named by him fails, there can be no question of the application of *cy pres* doctrine. Such intention need not be express but may be otherwise apparent from the terms of the disposition etc. So if the testator makes a bequest of Rs. 10,000 for an educational institution in these terms: “that in view of my long association as the manager of this institution it is my earnest desire to see that this institution promotes best the advancement of education and does not lag behind other and alike institutions in the town I bequeath.....although I am conscious how adversely it would affect my heirs.....” In such circumstances, if the institution fails or ceases to function, the doctrine of *cy pres* will not apply and the money set apart to remaining in trust will, instead of being devoted to other and alike institutions, be a resulting trust in favour of the testator's heirs since the testator intended to benefit a particular charity and had not shown or did not show a general charitable disposition.

If, on the other hand, the same bequest were in these terms: “I am very much concerned with the illiteracy prevailing among my townfolk and with a view to offer my humble contribution in wiping out the same I bequeath a sum of.....in trust for the school X.....”, if the School X ceases to function, the sum or any residue thereof will not, in this case, go to the heirs of the testator but will be applied *cy pres* and will be given in trust to an alike school in that town, since the testator showed an intention of advancing education in that town and the School X was only a specific way of achieving the general object.

Thus in *In re Ulverston and District New Hospital Building Trusts*<sup>96</sup> where contributions were invited and received partly from named donors and partly from street collections, entertainments, etc. but the fund so raised was insufficient to carry out the object, it was held that the fund having been collected with the sole object of building and maintaining a new hospital and not for the general charitable purpose of improving facilities for medical and

<sup>94</sup>. (1792) 1 Ves. 464.

<sup>95</sup>. *In re Wilson*, (1913) 1 Ch. 314, 320-321, per Parker, J.

<sup>96</sup>. (1956) 1 Ch. 622 (C. A.).

surgical treatment in the district, could not be applied *cy pres*. It was observed that although there could be no intention on the part of anonymous or unidentifiable donors to get back their contributions, no such intention or general charitable object could be imputed to the named or identifiable donors from the mere fact of the two classes of contributions being mixed up. Money received from identifiable sources was accordingly held to be a resulting trust in their favour while as to the rest, whose disposal was not in issue, it was suggested by James, L. J., that the might be treated as *bona vacantia*.

The underlying principle in all such cases is this: Had the testator known or adverted to the possibility that the particular object would or may fail, he would, if or in view of a general charitable intention, have chosen another object of his bounty which would have been as near as possible to the original intention.

- (iii) Where the charitable purposes expressed by the settlor do not exhaust the property affected or though exhaust when created, the income subsequently increases or a particular activity of the charitable trust is abandoned the question of the disposal of the surplus so accruing is one of construction for the Court. If by a consideration of the trust instrument together with other circumstances bearing on the disposal of the trust property, it appears that the settlor had a general and an exclusive intention with regard to the trust property in favour of charities and was limited in respect of the scope of its operation only on account of its income or his inability to transfer more or think out more generously, the surplus would be applicable *cy pres*. If, on the other hand, it appears that the provisions made in trust represented the highest limit to which he was inclined to go in favour of charities or a specific and sole charity, the doctrine of *cy pres* will not be applicable and the surplus would be held as a resulting or an otherwise implied trust.

So, if A transfers 50 bighas of land in a village yielding an annual income of Rs. 2,400 for awarding four scholarships for meritorious students in the University of Allahabad as his "humble contribution to the cause of education through the University of Allahabad" and the village in course of time develops into a big industrial town and the income amounts to one lac of rupees, the doctrine of *cy pres* will apply in respect of the increased income for increasing the scholarship in number or value, etc.

Similarly, if A sets apart one-third of his estate for charity and names three specific charities one of which comes to an end, the property or fund would be applicable *cy pres* to the remaining two charities or any other as a substitute of the one that has failed as may appear to have been the intention of the settlor.

Where the testator has shown an intention to use the whole or the remaining portion of a residue for a charitable purpose, it is enough<sup>97</sup> for the application of *cy pres* doctrine without the necessity of discovering a general charitable intention as defined in the other two cases. So, where the whole of the residuary estate of the testator was bequeathed "for the continuation of the seating" in a parish church and there remained a substantial surplus after complying with the testator's bequest so far as practicable, it was held<sup>98</sup> on the principle above stated, that there being the intention to part with the whole subject-matter, the surplus was applicable *cy pres*.

97. In *Re Royce*, (1940) 1 Ch. 514.

98. In *Re Raine*, (1936) 1 Ch. 417.

It is important to note that the *cy pres* doctrine cannot be displaced merely because the residuary bequest is to charity. The leading case on the point under the Indian law is that of the *Mayor of Lyons v. The Advocate-General of Bengal and others*.<sup>99</sup>

In this case the testator, a Frenchman, bequeathed his property partly to individual legatees and more largely to various charitable objects. The most prominent of the charitable bequests were the following legacies : (i) the annual sums of Rs. 5,000 and Rs. 1,000 to be applied respectively to the discharge and relief of poor debtors detained in prison in Calcutta ; (ii) the annual sum of Rs. 4,000 to be paid to the Magistrates of Lyons (in France) to liberate poor persons detained for debt ; (iii) the annual sum of Rs. 4,000 to be paid to liberate poor prisoners in Lucknow, but with a direction *in this case* that "if none, the sum is to remain to the estate."

The residuary clause of the will directed that "after the several payments of gifts and others, as also the several establishments, if a surplus of ten lacs remains that above surplus is to be divided in such a manner as to increase the three establishments (named above)."

The bequests to poor prisoners in Calcutta having failed by reason of the abolition of imprisonment for debt and the income of this fund having accumulated to Rs. 351,000, the question which arose the consideration of the Court in this case was whether this gift was to be dealt with on the principle of *cy pres* or it fell into the residue so as to increase the endowments of all the three establishments referred to above. The appellants, in favour of the latter, contended :

1. That the doctrine of *cy pres* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.
2. That if this be not true as a general proposition, the doctrine is inapplicable to the present case by reason of the special provisions in the will.

In rejecting both these contentions their Lordships of the Privy Council made, *inter alia*, the following observations :<sup>1</sup>

"Cases may be easily supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cy pres* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cy pres* doctrine is invariably displaced where the residuary bequest is to charity.

"Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cy pres* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

"The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to poor persons in Calcutta and Lyons are bequeathed, that the testator

99. (1875-76) L. R. 3 I. A. 32.

1. (1875-76) L. R. 3 I. A. 32 at pp. 54-55, 56-57, 59-60.



had contemplated the failure of either of these charities, or had formed an intention in that case regarding them ; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the prisoners at Lucknow in which there is a direction that in the event of failure it shall remain to the estate ; that he had not. If, then, such an implication can be made, it must be from the residuary clause itself ; construed with the other parts of the will relating to the *Martiniere* establishments...and from these it may be inferred that what was present to the testator's mind and what alone he intended to dispose of, was a residue after the funds of these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

"The sum of these opinions appears to be, that whilst regard may be had to the other objects of the testator's bounty in construing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in Calcutta be considered to have a local character ; and in that case, may not a scheme properly framed for the benefit of other poor persons in Calcutta be supported, as being *cy pres* to the original purpose."

In the application of the doctrine of *cy pres*, it is essential to note the following two points :

- (i) The *cy pres* doctrine is only applicable where the carrying out of the testator's intention is strictly<sup>2</sup> impossible : not otherwise *e. g.* not because, "the Charity Commissioners think that another scheme would be more beneficial".<sup>3</sup> So, if the gift be to an educational institution X or a hospital Y, such an institution or hospital must have the benefit of this gift although it may not admittedly be in a position to serve the intentions of the donor or the interests of the public proportionately to the gift and that a similar institution in the same situation would promote the objects of the trust better.

There is, however, a tendency to give a liberal construction to the term 'impossible'. It may be illustrated through the case of *Re Dominion Students Hall Trust*.<sup>4</sup> Here charity was by a company limited by guarantee and the benefits of the trust were restricted to Dominion students of European origin and the company sought the confirmation by Court of a special resolution, passed at an extraordinary general meeting, that the words 'of European origin' be deleted thus throwing the benefits open to all Dominion students, regardless of race. In confirming this resolution or scheme, it was held by the Court that the word 'impossible' must be widely construed and can cover such a case as the present, where everything went to show that the retention of a 'colour bar' would defeat the whole object of the charity.

It may be submitted that such modifications are or must be limited to cases where the circumstances have become so materially different, on account of the charity being ancient or otherwise, that it appears reasonable to presume that the settlor himself would have modified his scheme to such an extent in order to serve his original object.

- (ii) In applying the doctrine, the new purpose must, as nearly as possible, be in the nature of the particular purpose intended by

<sup>2</sup> Ashburner's Principles of Equity, 2nd ed., p. 117.

<sup>3</sup> In *re Weirs Hospital*, (1910) 2 Ch. 124.

<sup>4</sup> (1947) Ch. 183. See also *Att.-Gen. v. Price*, (1912) 1 Ch. 667.

the settlor. So, if A makes a gift to a hospital X in Allahabad and there is no hospital of this name, it would be near to the object of the donor if the gift is given to another hospital in Allahabad and not to give it to an educational institution in Allahabad or to a hospital in another city of India. But if the hospital X was supposed or was described to be one specialised in a particular disease or a particular system of medicine, it may be near to the object failing to allow the gift to go to such a hospital in another city though much away from Allahabad.

It need also be mentioned that when it is found that the doctrine of *cy pres* is applicable to a particular charitable trust, the Court orders a scheme to be prepared by or with the approval of the Advocate-General. This is subsequently submitted to the Court and, on approval by it, takes the place of the original purposes designed by the settlor. The Advocate-General and the trustees are the only persons who are entitled to settle the scheme of *cy pres* application of the trust fund. Other persons can intervene only when the scheme is submitted for the confirmation of the Court.

2. As to uncertainty in object.—The second distinction between a public and a private trust though arising out of, and to a large extent covered by, the first considered above, may be stated thus: Within the ambit of the *cy pres* doctrine, a charitable trust does not fail for uncertainty in object whereas a private trust fails for any uncertainty in object.

In the eye of law, charity has this saving grace that it is held to be by itself denominative of a distinct class and it is on that principle that a gift in favour of charity, as discussed above, is good and operative notwithstanding the fact that it does not specify any particular and definite charitable object. It has accordingly and consistently been held by the Courts in England as well as in India<sup>5</sup> that a gift to “such charities as the trustees may think deserving” would be valid and given effect to.

It need, in this connection, be noticed that if the settlor prefers or goes on to specify the particular objects, those objects must in themselves be charitable and it would not, for the purposes of the nature or the validity of trust, matter or make any difference because the particular objects specified are reinforced or preceded by the use of the expression “a general charitable intention” or have even been stated to be in furtherance of the same except, of course, where there is an over-riding intention to devote the estate to charity in general.<sup>6</sup> “It is ironical”, said Hornman, J., “to think that this general charitable intention has many times been implied, though not expressed, but where expressed may well fail because it is shown by the very fact of being expressed not to have the meaning which the testator perhaps intended to put upon it.”<sup>7</sup>

If, on the other hand, instead of the term ‘charity’, the disposition is made in favour of purposes which are ‘benevolent’, ‘philanthropic’, ‘pious’ etc.,

5. *Smith v. Massey*, (1906) 30 Bom. 500 ; *Govardhan Das v. Chunni Lal*, (1908) 30 All. 111 ; *Surbomangol v. Mahendra Nath*, (1879) 4 Cal. 508 ; *Commissioner of Income Tax, West Bengal v. Sardar Bahadur Sardar Indra Singh Trust*, A. I. R. 1956 Cal 164.
6. *In re Wilson*, (1913) 1 Ch. 314, in which case the general charitable intention will remain and be carried out notwithstanding the invalidity or failure of the particular benefaction ; see ante—2nd head of *cy pres* doctrine.
7. *In re Sanders' Will Trusts*, (1954) 1 Ch. 265—where a bequest for providing dwelling-houses for the working classes in a particular area failed notwithstanding the testator's express use of the phrase ‘general charitable intention’ on the ground that a gift for the ‘working classes’ was not a gift for the relief of poverty and in fact that it was in furtherance of the general charitable intention made no difference or improvement.

it will, a shown before, fail for uncertainty in object because these objects are not charitable in the legal sense. It has accordingly been held that the object in a bequest of a house and lands for the High Commissioner or other representative of the Commonwealth of Australia in England, though no doubt laudable, could be described more appropriately as 'political' rather than 'charitable' and did not, therefore, come within the legal definition of charity.<sup>6</sup>

There is a distinct and well-established class of cases where the general intention in favour of charity is not expressed but inferred from the character or officer of the trustee. The law on the point has been summarised as follows :

"Where there is a gift to a person who holds an office the duties of which are in their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for charitable purposes inherent in the office."<sup>8</sup>

Thus where the bequest was to "His eminence the Archbishop of Westminster Cathedral London to be used by him for such purposes as he shall in his absolute discretion think fit", it was held that the bequest was a gift to him as a trustee and not beneficially and that he held the estate on a valid charitable trust for ecclesiastical purposes.<sup>10</sup>

If, however, the purposes of the gift are plainly expressed in terms not confining them to purposes which are in the legal sense charitable, they cannot be confined to or upheld as being for charitable purposes merely by reference to the character of the trustee.<sup>11</sup>

Thus where the bequest is for a purpose which is not charitable in the legal sense, it cannot be effective by a provision added in the will that in case of the failure of the specified object, the property should be applied to such uses "as the National Trust and X may jointly decide or if X be not alive, as the former may decide."<sup>12</sup>

In order that a gift to charity may be upheld and given effect to, it is absolutely necessary that the purpose expressed must be *distinctly* and *exclusively* charitable. Therefore, where charitable purposes are mixed with purposes which are not charitable in the legal sense or where description includes purposes which may or may not be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty in object. Thus where property was transferred for such 'charitable or benevolent', 'charitable or philanthropic', 'charitable or pious', 'charitable or public' purposes as the trustees in their absolute discretion shall think proper, it was held by the Court in England that the whole gift must fail for uncertainty in object. The same principle has been laid down by the Courts in India and it has been held that a trust for *sara kam* (good work)<sup>13</sup> or "a trust for popular usefulness or for the purposes of charity"<sup>14</sup> as may be approved by the trustees, are void for uncertainty in object and must fail.

8 In re Spensley's Will Trusts, (1951) 1 Ch. 233 ; see also In re Corelli, (1943) Ch. 322—where a similar gift of a house and grounds for the benefit and service of 'distinguished visitors' from far countries was held not to be a valid charitable trust.

9. Per Jenkins, L. J. In re Spensley's Will Trusts, (1954) 1 Ch. 233 243.

10. In re Flinn, (1948) Ch. 241 ; see also In re Rumball, (1956) 1 Ch. 105 on similar facts and decisions.

11. In re Davidson, (1906) 1 Ch. 567 ; Dunne v. Byrne, (1912) A. C. 407.

12. In re Spensley's Will Trusts, (1954) 1 Ch. 233.

13. Bai Bapi v. Jamnadas, (1898) 22 Bom. 774.

14. Tricumdas v. Haridas, (1907) 31 Bom. 583.

The principle underlying the invalidity of such gifts or bequests may be clearly stated in the following words of Viscount Simon, L. C. in *Chichester Diocesan Fund and Board of Finance v. Simpson and others*,<sup>15</sup> where the testator by his will, directed his executors to apply the residue of his estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England and the bequest was held to be void for uncertainty :

"It is not disputed that the two words 'charitable' and 'benevolent' do not ordinarily mean the same thing. They overlap in the sense that each of them, as a matter of legal interpretation covers some common ground but also something which is not covered by the other..... The conjunction 'or' may be sometimes used to join two words the meaning of which is the same, but as the conjunction appears in this will, it seems to me to indicate a variation rather than an identity between the coupled conceptions. Its use is analogous in the present instance to its use in a phrase like 'the House of Lords or the House of Commons', than to its use in a phrase like "the House of Lords or the Upper Chamber".

Similarly, it was held by the Privy Council in *Runchordas v. Parvatibai*<sup>16</sup> that a gift for *dharam* is void for vagueness and uncertainty. In Wilson's Dictionary the word *dharam* is defined to be law, virtue, legal or moral duty. Relying upon this definition of the word, their Lordships held that the word *dharam* was as vague as the words "purposes charitable or philanthropic", which, on account of their vagueness, render a trust for those purposes void in the English law.

Recently the Andhra Pradesh High Court in *G. Moorthanna v. G. Chinna Ankiah*<sup>16a</sup> examined the validity of a will in which property was dedicated by a Hindu to a Muslim tomb. It was contended that the object for which dedication has been made is not lawful according to the creed of the dedicator. Upholding the contention the court held that the dedication by a Hindu to a Muslim tomb is unlawful for the reason that under the Hindu law a person following that religion cannot dedicate property to a tomb. The court placed reliance on the following passage of the learned author, Ameer Ali of his book on Mohammedan Law :

"Any person of whatever creed may create a wakf, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator. Divine approbation being the essential element in the constitution of a wakf, if the object for which a dedication is made is sinful, either according to the laws of Islam or to the creed of the dedicator, it would not be valid."

The High Court of East Punjab, purporting to follow the above-noted judgment of the Privy Council, held in *Shadi Ram v. Ram Kishen*,<sup>17</sup> that a trust giving the trustees the right to use the trust property "for the advancement of medical aid to human beings or other charitable purpose in accordance with their absolute discretion" was void for uncertainty and vagueness. It is submitted that the judgment does not proceed on a correct exposition of the law on the point and the basis or limitation of the Privy Council decision has not been clearly marked.

15. (1944) A. C. 341.

16. (1899) L. R. 26 I. A. 71 followed in *Bhai Gurdit Singh v. Sher Singh*, 78 P. R. 1912 where a trust for "Dharmarth" failed as being vague and uncertain.

16a. A. I. R. 1975 A. P. 97 at 101.

17 A. I. R. 1948 E. P. 49.

The object of the trust could not, it was stated, be vague or uncertain if the trust deed had provided simply for the advancement of medical aid to human being, but the difficulty or defect, it was pointed out, lay in the latter viz., "on other charitable purpose" it being open to the trustees to ignore or avoid the former altogether. Such a trust, it was conceded, would not fail under English law but it was ruled that a trust by a Hindu expressed to have been created for charitable purposes without any further attempt to define the purpose or object cannot but be regarded as vague and uncertain; the reason being that among Hindus, the words "charitable purpose" have such a diversity and variety of connotations that what one set of persons may regard as a charitable purpose may not be regarded as such by another set and may even be regarded as sinful by a third set. The settlor under English Law, it was added, could be presumed to have had the same intention or object as contained in the Statute of Elizabeth but no such presumption could be made in India or in case of Hindus. Reference to and reliance on the almost identical definition of 'Charity' under Section 2 of the Charitable Endowments Act, 1890, remained ineffective on the ground that that Act provided for the vesting and administration and not the nature and scope of such trust. Section 18 of the Transfer of Property Act, 1882,<sup>18</sup> does not seem to have been cited although it is difficult to imagine whether even that would have varied the decision.

In cases where charitable objects or purposes are mixed with those which are not charitable, it is, indeed, open to or possible for the trustees to devote the whole fund or property to an object distinctly and exclusively charitable in the legal sense but the test<sup>19</sup> for the validity of such transfers is not, whether the trustee could, if he thought fit, apply the whole to charitable uses, but, whether he could not, consistently with the trust instrument, apply the whole of it to non-charitable uses. If the trustee be competent to apply, without breach of trust, the whole of the property to non-charitable uses, the trust is not distinctly and exclusively for charity and must, therefore, fail for uncertainty in object. The object and scope of the Act discussed below, it is submitted, are limited to such cases or dispositions alone.

Some of the dispositions towards charitable objects otherwise falling under or failing on account of the law as stated above are saved or validated under English law by means of the Charitable Trusts (Validation) Act, 1964, the provisions of which do not appear to be clear. "I confess" said Lord Evershed, "...that I have found considerable difficulty in following the language of the Act of 1954 and in comprehending its true purpose and effect,"<sup>20</sup> The Act is "intended to cure disposition whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable or wholly charitable so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague."<sup>20a</sup> 'Imperfect trust provision' which the Act purports to cure means "any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable."

18. Which, of course, did not extend to Punjab but is applied on the principle of analogy.

19. *Inland Revenue Commissioners v. Baddeley and other*, (1955) A. C. 572, 586.

20. *In re Harpur's Will's Trusts*, (1962) 1 Ch. 78 (C. A.) at p. 87; see also *Harman*, L. I. at p. 95 "The fact remains that the words of the statute are most difficult."

20a. *Per Harman J. in re Gillingham Bus Disaster Fund, Bowman and others v. Official Solicitor*, (1958) 1 Ch. 300, 305.

One at least of the kinds of trusts which undoubtedly the Legislature had in mind to validate was the "charitable or benevolent" kind. What, however, is the precise scope of the Act is still unsettled. It is, however, clear<sup>20b</sup> that the Legislature was determined not to make a clear sweep in the matter. There was already a statute on the books of the New Zealand Legislature which had in plain terms done so, but Parliament in England was minded to limit more precisely the effect of a statute whose result was obviously to some extent to deprive a testator's next-of-kin of the existing right.

In *In re Harpurs Will's Trusts*<sup>20c</sup> a testatrix by her will declared her trustees to pay and divide the residue of the trust estate "between such institutions and associations having for their *main object* the assistance and care of the soldiers, sailors, airmen and other members of H. M. Forces who have been wounded or incapacitated during the recent world wars" in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate. It was held that the gift was not within the scope of Section 1 (1) of the Act of 1954 for the saving of "imperfect trust" provisions, as therein defined was confined to cases where the provisions could properly and fairly be said to declare the objects, and to so describe them that effect could be given to them by limiting the application to purposes which would be exclusively charitable. The gift in question did not declare the objects to which the fund, when paid over to suitably qualified institutions, was to be applied and the gift to an institution the main object of which was charitable could not necessarily be exclusively charitable. The gift was accordingly invalid.

Harman, L. J., observed: "This may be called a tragic case, for I can feel little doubt that the testatrix meant in effect to benefit members of Her Majesty's forces.....and one can but feel regret if that intention is to be defeated."

Similarly, where the trust fund was directed, *among other things* to "defraying funeral expenses, caring for boys who may be disabled, and then to *such worthy* cause or causes in the memory of the boys who lost their lives (in the Bus Accident) as the Mayors may determine, it was held that the trust failed, and was not covered or saved by the Act of 1954.<sup>20d</sup>

In *re Cole Westminster Bank Ltd. v. Moore and another*,<sup>20e</sup> the gift "for the general benefit and general welfare of the children for the time being in South Down House failed" because the gift not being for the South down House as a home, its income will be applied in ways which were not charitable on any construction of the preamble to Charitable Uses Act, 1601.

In view of the authorities and the import of the Charitable Trusts (Validation) Act, 1954, the decision in *In re Wykes*<sup>20f</sup> upholding a bequest to Directors of a company "to be used at their discretion as a benevolent or welfare fund or welfare purposes for the sole benefit of the past, present and future employees of the company" as being covered and saved by the Act of 1954 notwithstanding the fact that the entire fund could consistently with the terms of the disposition be used exclusively for purposes which were not charitable and that the bequest did not include by express reference some charitable purpose as well as other non-charitable purpose. This case was decided by

20b. Per Harnman, L. J. in *In re Harpurs Trusts*, (1962) 1 Ch. 78 at p. 95 (C.A.)

20c. (1962) 1 Ch. 78 at p. 93, (C.A.) affirming decision of Cross, J. in (1961) 1 Ch. 38.

20d. 20a Ibid upheld by the Court of Appeal in (1959) 1 Ch. 62, (Omerod L. J. contra).

20e. (1958) 1 Ch. 877 (C.A.) Evershed, L. J. contra.

20f. (1961) 1 Ch. 229.

Buckley, J., whose argument as a counsel in *Gillingham case*, discussed above did not prevail for such a broad construction of the provisions of the Act.

The word 'or' severes "charitable" from the cognate expression like benevolent and philanthropic *etc.* so that two different classes may become the object. But if such terms are joined with the conjunction 'and' instead of 'or' e. g., "charitable and benevolent", "charitable and philanthropic" *etc.*, the gift would be good and be given effect to<sup>21</sup> because the two terms would then be read conjunctively and mean objects which were *both* "charitable and benevolent" or "charitable and philanthropic", *etc.*

Mention, in this connection, need be made of another class of cases where a trustee is given a discretion as to the apportionment of the trust fund between charitable and non-charitable purposes. Such trust will not, according to the test laid down above, fail for uncertainty in object.<sup>21a</sup> The trustee may exercise his discretion and must allot some fraction of the property however small it may be but cannot altogether ignore the charitable purpose. If the trustee does not exercise the discretion given to him, the Court will divide the property equally between charitable and non-charitable objects on the basis of the maxim "Equality is Equity".

3. As to the rule against perpetuity.—The ordinary rule of law against perpetuity, which applies in case of a private trust and renders it void if the transfer falls within that rule but it, does not, to *the same extent*, apply to a charitable trust.

For an adequate study of the rule against perpetuity the reader must refer to a suitable treatise on the subject. It may here be sufficient to state the bare rules against remoteness in the following heads :<sup>22</sup>

(a) *The modern rule against perpetuities* which may be stated thus :

- (i) A limitation of any interest in any property, real or personal, is void if it is capable of vesting after the perpetuity period has expired.
- (ii) The perpetuity period consists of a life or lives in being at the time of the gift, together with a further period of 21 years [this period in India is 18 years] ; where gestation actually exists, the period of gestation may be added.

It is important to note that charitable gifts are exempt from the operation of this rule in only one respect [beyond which a gift to charity upon a remote event is incapable of taking effect just as if it had been to an individual],<sup>23</sup> namely, that if the commencement of the charity within the perpetuity period is ensured, an executory gift over on the happening of an event which may be remote will, notwithstanding such remoteness be good. This may be illustrated by referring to the following case :

A testator<sup>24</sup> bequeathed to the estate of a charity a sum of money subject to a condition that they kept in repair his family cemetery, and on breach of such condition he directed that the legacy should go to another charity. It was held that the condition is good and operative. It must be noted that the condition will not be good and effective if the gift over is not for another charitable purpose or the trust to which it is attached is not charitable though the gift over is.

21. *Re Sutron*, (1885) 28 Ch. D. 464.

21a. *Re Clarke, Bracey v. Royal National Life Boat Institution*, (1923) 2 Ch. 407.

22. See *A Manual of The Law of Real Property* by R. E. Megarry.

23. In *re Spensly's Will Trusts*, (1954) 1 Ch. 233, 241, 243.

24. *Re Tyler, Tyler v. Tyler*, (1891) 3 Ch. 252.

(b) *The rule against inalienability.*—It is a fundamental rule of English law that property must not be rendered inalienable. Although property cannot, on this principle, be rendered inalienable for ever, it seems that a limitation rendering property inalienable for the perpetuity period may be valid.

Charities are completely exempt from the rule against inalienability ; no gift for charitable purposes is void<sup>25</sup> merely because it renders property inalienable in perpetuity.

(c) *The rule against accumulation.*—The rule may be stated as follows : No person can by any instrument or otherwise settle or dispose of property in such a manner that the income thereof shall be accumulated for any period longer than the perpetuity period. Such a direction to accumulate is totally void. This does not, however, apply in case of charitable gift.

Under the Indian law Section 18 of the Transfer of Property Act, 1882, provides that the restrictions in Sections 14, 16 and 17 shall not apply in the case of a transfer of property for a charitable purpose. Section 14 lays down the rule against perpetuity. Section 16 provides for the failure of an interest which is to take effect on the failure of an interest under Section 14 or under Section 13 [transfer for the benefit of unborn person] and Section 17 lays down the rule against accumulations of income. It is significant to note that Section 18 does not make an exception in case of Section 10 which contains the rule against inalienability.

4. *As to Execution.*—A private trust is enforceable at the instance of the beneficiaries under the trust. On the other hand, the sovereign as *paterfamilias* is directly interested in the proper execution of all charitable trusts and the duty of enforcing them accordingly falls the Attorney or the Advocate-General.

In India Section 92 of the Code of Civil Procedure, 1908, provides that no suit in respect of a public and charitable trust can be instituted without the sanction of the Advocate-General. This section has been borrowed in part from the Charities Procedure Act (Romilly's Act) 1812 of England.

5. *As to Exercise of Powers.*—In case of a private trust, if the trustees have a power to do a certain thing, such power cannot be exercised unless all the trustees agree to its exercise and in case there is no unanimity the power lapses. This is not so when the trust is charitable where such powers may be exercised by a majority of the trustees without the consent or contrary to the wishes of the minority.

6. *As to Exemption from Income-tax.*—Where the income of the property is applicable for charitable purposes and is so applied, no income-tax is payable. In case of a private trust there is no such exemption. A provision to this effect has accordingly been made both in England (Section 37 of the Income Tax Act, 1918) and in India (Section 4 of the Income Tax Act, 1922).

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25. This is how contract has been laid down by leading text-books. But since in case of absolute restraint on alienation, it is the condition and not the transfer that becomes void, the correct way of stating this point of contract may be that a restraint upon alienation beyond the perpetuity period is void in private trust but is valid in case of a charitable trust.



## CHAPTER XXIII

### CREATION OF TRUSTS

It need be recalled<sup>1</sup> that one of the bases for the classification of trusts was with regard to the mode of their creation and the three principal divisions of trusts under this classification are : express trust, implied trust and constructive trust. An express trust is the creation and arises from the acts and declaration of the parties while an implied and a constructive trust are the creation of law and arise on the strength of certain presumptions or construction which the Court is called upon to make under different situations or circumstances connected with the transfer or acquisition of property. It is, therefore, proper and necessary to consider the subject under two heads (i) Express Trust ; (ii) Trusts arising by the operation of law.

#### EXPRESS TRUSTS

Trust ordinarily implies three parties : the settlor or the author of the trust, the trustee and the beneficiary, and the question generally is who can assume, acquire or be given any of these positions and how it may be achieved or effected. The creation of a trust further implies a resolution on the part of the settlor to that effect and the question is how it may or must be made or shown. Can it be by word of mouth or must it be in writing and should it be attested and registered ? Then there must be some fund or other property on which the trust would operate. Is it that any property may be the subject-matter of trust or does the law impose any restriction regarding that ? These are roughly the points for investigation under this head and have been provided for by Sections 4 to 10 of the Indian Trust Act, 1882.

**The declaration of an express-trust.**

No formal language is necessary to constitute an effective declaration of an express trust but whatever may be the language used, it must make it certain :—

- (i) that the settlor intended *to constitute a trust* binding on himself or on the person to whom the property was given ;
- (ii) that the settlor intended *to bind definite property* by the trust ; and
- (iii) that the settlor intended *to benefit definite persons* in a definite way.

These three requisities in the declaration of an effective express trust are commonly called the *three certainties* of an express trust and were first laid down and named as such by Lord Langdale in *Knight v. Knight*.<sup>2</sup> No trust can arise in case the declaration is indefinite with regard to one or more of these essentials.

The *first certainty* is with regard to the intention of the settlor. Of course, the words “in trust for” or “upon trust to” are the most common and proper for expressing a fiduciary purpose but it is not necessary and any form of expression would do provided it can, on the whole, show an imperative intention to create a trust.

Thus if A transfers properties to B and direct him to sell it and pay the proceeds to C or directs him to apply the property for the benefit of C a trust

1. See pp. 205-208 supra.

2. (1860) 3 Beau 148 at p. 173.

would, in all such cases, be created in favour of C, although the word 'trust' is not used. No trust would, on the other hand, arise if the words used do not show an absolute or imperative intention or direction to that effect. So if A transfers properties to B saying that B might keep it for the benefit of or saying that it was his wish or desire that B should give annuity of Rs. 300 to X, there is not the requisite intention for a trust and no trust would accordingly arise.

As stated before,<sup>3</sup> trusts may even be constituted by precatory words, *i. e.* word of wish, hope or desire provided there is, considered as a whole, the requisite intention to create a trust. It would be convenient to take up this point, *i. e.* precatory trust, after considering the other two certainties.

The next certainty is that with regard to the subject-matter of trust. Obviously, if the words are not clear and definite with regard to the property in respect of which the trust must be operative, no effect can be given to it. So if A bequeaths certain properties to B desiring him to divide the bulk of it among C's children, it will not give rise to a trust because the trust property is not indicated with sufficient certainty.

The third certainty is with regard to the objects of the trust. If the objects are not clearly defined, the trust cannot be given effect to and must fail. A bequeaths certain property to B, requesting him "to continue it in his family" or "to distribute it among such members of C's family as he may consider most deserving". It will not create a trust, for the beneficiaries are not indicated with sufficient certainty.

It is instructive to consider the different effects of an imperfect declaration upon the transaction when either of these certainties is lacking. If the first certainty is lacking, there can obviously be no trust and if the property has been transferred, the person to whom it has been transferred would take it beneficially for himself. If the second certainty is absent, there is no property that is affected and the intention of the settlor must fail to operate and no further question arises in this case. If the first and the second certainties are present but the third certainty is lacking, there is no trust. The property, in this case, becomes vested in the trustee. Being a trustee, he cannot repudiate it. On the other hand, owing to the uncertainty in respect of the beneficiaries, he cannot execute it. Hence it would be a resulting trust for the benefit of the settlor or his legal representatives.

Section 6 of the Indian Trusts Act, 1882, dealing with the creation of an express trust, adds to the three certainties considered above two further requirements. These are :

- (iv) The author of the trust must indicate with reasonable certainty "the purpose of the trust", and
- (v) the author of the trust, (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.

With regard to the purpose of the trust, it is submitted that it should not be classed or considered as a certainty in the sense explained above. If the purpose, expressed or unexpressed, is lawful, the trust should be operative. On the other hand, the trust would not be operative if the purpose, though clearly indicated, is unlawful. If the three certainties are present the trust ought to take effect leaving it to the person who seeks to avoid it to show what is the purpose of the trust and that that purpose is unlawful.

3. See p. 210.

With regard to the transmutation of possession of the trust property, it may be said that it is not necessary or possible in case (a) the trust is created by will; (b) the author of the trust is himself to be the trustee. In the former case, a will, being ambulatory during the lifetime of the testator, can take effect only after his death when the trust property would automatically vest in the trustee. In the latter case, the property is already in the possession of the trustee. There is only a change in his status. Before the trust his possession was of as an absolute owner and after the trust it becomes only the possession of a trustee. The question of the transfer of possession is thus relevant only in cases of trust other than those of the above two classes, *e. g.*, if A executes a trust deed in favour of B and appoints C as the trustee. According to the language of the section, it is just as any of the three certainties, necessary that A transfers the possession of the property to C. But must the trust fail if every other requirement is complete except the transfer of possession of the property? An affirmative answer to the question, though warranted by or permissible under the letter of the section would be in complete disregard of the distinction between a voluntary trust and a trust for value. If it is only a voluntary trust it must fail unless possession of property is transferred but this cannot be fatal in case of trust for value where the settlor would be compelled to transfer the possession of the property to the trustee even where no trustee has been named or appointed by the settlor because the maxim is "Equity will not allow a trust to fail for want of a trustee."

#### **Lawful purpose.**

In order that a trust may take effect it is necessary that it must be one for a lawful purpose. A trust of which the purpose is unlawful is void. Section 4 of the Indian Trusts Act, 1882, lays down that the purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.

Some examples may be given of void trusts on account of their purpose being unlawful. A trust in which an attempt is made to postpone the enjoyment to an indefinite period or to prevent the alienation of property for ever would be void as offending against the rule of perpetuity. A transfer of property in trust for X with a view to defraud creditors, a trust in restraint of marriage, or a trust for future illegitimate children being contrary to public policy and tending to encourage immorality would similarly be void. But a trust for an illegitimate child in being, if clearly designated as the object of the gift, would be good because it does not encourage immorality.

If the trust is created for several purposes of which some are lawful and others unlawful and those that are lawful are clearly severable from those that are unlawful, the trust would be effective in so far as it concerns the lawful ones. If it is not possible to separate the lawful from unlawful purpose the whole trust must fail.

If a trust is created of immovable property situated in a foreign country, the trust must conform to the laws of the land where the property is; it being an established rule of universal application that questions with regard to a real or immovable property, *e. g.* right of alienation or course of succession, *etc.* are all governed by the law of the place where the property is situated.

Where a trust is created for discharging debts of settlor, the object has not been held to be unlawful. It was said that the trust in dispute was for lawful purpose within Section 4 of the Act.<sup>4</sup>

4. *Chogmal Bhandari v. Deputy Commercial Tax Officer*, A. I. R. 1976 S. C. 656, 659.

**Formalities.**

In England before the Statute of Frauds, 1677, a trust of any property could be created by word of mouth. But by Sections 7 and 8 of that Statute, writing was made necessary in case of a trust of land. The relevant provision is now contained in Section 53 (1) (b) of the Law of Property Act, 1925 : "A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."

This does not affect the creation or operation of resulting, implied or constructive trust, nor does it affect a trust of personal chattels which may still be declared by word of mouth.

The requirements as to writing have been introduced with a view to prevent fraud ; a trust will not, therefore, be rendered ineffective if the non-compliance with the requisite formalities has been due to the fraud of a person who would benefit upon the failure of such trust. The underlying maxim is that "Equity will not permit a statute to be a cloak for or engine of fraud".

Similarly provision of law with regard to the requisite formalities for the creation of an express trust has been made in India through Section 5 of the Indian Trusts Act, 1882 under two heads :

- (a) *Immovable property*.—If the trust is created by means of a will, it must comply with the formalities required for a will. The relevant provisions are contained in Sections 63-66 of the Indian Succession Act, 1925 which apply to all persons in India except those governed by Mohammedan Law. Section 63 requires (except in case of soldiers employed in an expedition or engaged in actual warfare) the will to be in writing signed by the testator or by some other person in his presence and under his direction and further to be attested by two or more witnesses. According to Mohammedan law a will may be made orally or in writing and even if it be in writing it does not need either signature or attestation.

If the trust is created by a non-testamentary instrument it must be in writing signed by the author of the trust or trustees and registered.

- (b) *Movable property*.—In case of movable properties there are two alternatives : (i) Either all the formalities required for the trust of immovable property must, according to the above circumstances, be complied with or (ii) in case those formalities are not adopted or complied with, the ownership of the property must be transferred to the trustee. Ordinarily, the mere transfer of possession of movable property coupled with intention of the parties that such delivery of possession should vest the property in the trustee would be sufficient to create a trust in this way.

None of these provisions would, however, apply where they would operate so as to effectual a fraud.

**Property which may be the subject of trust.**

The topic becomes practically that of the transfer of property in general and not much need be said here in relation to trust. The general rule is that every kind of property, movable or immovable, which may be legally transferred or disposed of may be the subject of trust, but it must not be a mere beneficial interest under a subsisting trust. This restriction under Section 8 of the Indian Trusts Act, 1882, is to avoid complications that might arise in allowing a trust upon a trust and is a departure from the English law where

the beneficiary is competent to create a trust in respect of his own beneficial interest in any trust.

Trust may be created of property which is not in the actual possession of the settlor such as the property to which he will become entitled upon the death of a third person provided it was vested in him at the time of transfer. But a mere expectancy in the nature of naked possibility, cannot be the subject of trust. A reversioner, presumably, entitled to the estate held by a Hindu widow, cannot create a valid trust in his possible interest.

### Parties.

The parties necessary to the formation of a trust are (i) the settlor ; (ii) the trustee and (iii) the beneficiary ; and the relevant enquiry in this connection is with regard to the capacity of each to be or act as such. Generally speaking, this capacity is co-extensive with the capacity to hold and dispose of property. This again is a subject of the general law and there is no speciality in it in its relation to trust. The following points need be mentioned in this connection :

- (i) If the trust is sought to be created by or on behalf of a minor, the permission of a principal Civil Court of original jurisdiction must be obtained to that effect ;
- (ii) It is open to the beneficiary to disclaim any interest in the trust and he may do it either by addressing the trustee to that effect or by setting with notice of the trust, a claim inconsistent with the trust ;
- (iii) Although there is no disqualification as such to the appointment, no trustee can act as such unless he is competent to contract ; <sup>a</sup>
- (iv) The trustee is not bound to accept a trust but if he chooses to accept the office he can accept it either expressly or impliedly by actually acting as such ;
- (v) If a trustee disclaims his office, the trust property vests in the remaining trustee or trustees.

### Precatory Trusts.

The question of a precatory trust generally arises in a bequest or gift. Where the words accompany a gift, which are not imperative but merely expressive of confidence, belief or desire that the donee will apply the bequest in a particular manner, the question is whether the donee takes it absolutely or it is a trust in favour of those for whom the precatory words are used ?

A testator leaves property to T and then expresses a hope that T will use it in a certain way or for a certain purpose. Or the testator leaves his property to his wife and then says, I hope, I believe that she will maintain our children" or "of course she will provide for our children". The question arises whether T or the wife takes the property as an absolute owner or only as a trustee.

In the past the Courts seem to have been eager to catch at any phrase which could possibly be twisted into an expression of trust, and thus discovered an intention of trust in the use of the words, 'wish', 'desire', 'hope' and the like even where no such intention existed. This attitude of equity has been the subject of many an adverse criticism.

"In hearing case after case cited", said James, L. J., "I could not help feeling that the officious kindness of the Court of Chancery in imposing trusts

4a. See Section 10 of the Indian Trusts Act, 1882. Reading this section together with Section 60 of the Act, it is clear that if the personal law of the beneficiary allows it, a married woman and a minor may be appointed as trustees but the minor cannot exercise any discretionary power under the trust.

where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed.”<sup>5</sup>

“The doctrine of precatory trusts”, said Lopes, L. J., “is a creature of equity, by whose aid the intentions of the testators, in my judgment, have too frequently been defeated.”

The earlier decisions on precatory trusts may be generalised under the following rule :

Where property given and the object for which it was given were certain, words which were *prima facie* of request or recommendation would be treated as imposing a trust.

In recent years there has been a marked reaction against the more extreme applications of the doctrine of precatory trust. The current of decisions has changed and requires the intention (besides, of course, the certainty in property and the object) to exist as a fact. The question now is this : Whether looking at the whole instrument, the donor has meant to impose an obligation on his donee to carry out his expressed wishes or whether having expressed his wishes he has left it to the donee to act on them or not at his discretion ?

There is, however, no easy formula for deciding the question whether the precatory words in a particular bequest can or cannot be construed as obligatory. Pomeroy has stated the rule as follows :

“Upon the authority of the modern decisions, the whole doctrine may be summed up in a single proposition. In order that a trust may arise from the use of precatory words, the Court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition that the testator’s intention so to create a trust was as full, complete, settled and sure as though he had given the property upon a trust declared in express terms in the ordinary manner.”<sup>6</sup>

So if A bequeaths certain property to B, “having the fullest confidence that he will dispose of it for the benefit of C,” the words used would be sufficient to constitute a trust.<sup>7</sup>

On the other hand, where X bequeaths certain property to the wife for her absolute use adding that “he had full confidence that she would do what was right as to the disposal thereof between his children in her lifetime or by will after her decease”, it would not give rise to a trust in favour of the children and the wife would take absolutely.<sup>8</sup>

The general rule as stated by Joyce, J., in *re Conolly*<sup>9</sup>, is this “where in a will words of gift are used, which by themselves are sufficient to give..... the whole of the property in the subject-matter of the gift, then the interest..... will not be cut down.....by the mere expression of a desire”. Here the testator bequeathed stocks and shares to his sisters adding, “I specially desire that the sums herewith bequeathed shall.....be specifically left by the legatees to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select and in such proportions as they may determine” and it was held that the sisters took an absolute interest in the property and no trust arose.

5. *Lambe v. Eames*, (1871) 6 Ch. App. 597, 599.

6. Pomeroy’s Equity Jurisprudence, 5th ed, Vol III, p. 1034.

7. *Illus. (a)* to section 6 of the Indian Trusts Act, 1882.

8. *Re Adams and Kensington Vestry*, (1884) 27 Ch. D. 394.

9. (1910) 1 Ch. 219.

In India, the leading case on the point is *Mussoorie Bank Ltd v. Raynor*.<sup>10</sup>

In this case Captain Raynor, the testator, gave to his wife the whole of his real and personal property and the expression which accompanied the bequest and was the subject of construction in this case was, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." During the lifetime of Mrs. Raynor no question arose as to the nature of the will. After her death the son brought a suit seeking to set aside the decree and attachment order in favour of the Bank for money advanced by it to Mrs. Raynor and the question arose whether Mrs. Raynor took only a life interest in her husband's property subject to an ultimate trust in favour of the son and as such it was inalienable or she took an absolute interest in the property. The Subordinate Judge dismissed the suit on the ground that Mrs. Raynor acquired, under the will, an absolute interest in the property. The judgment was reversed, in appeal, by the High Court of Allahabad on the ground that she took only as a trustee. It was held in appeal by the Privy Council that the doctrine of precatory trust did not apply in this case and that Mrs. Raynor had acquired an absolute interest in the property and was competent to alienate it in favour of the appellants. Their Lordships observed :

".....The current of decisions, now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trust is not to be extended.....No case has been cited, and probably no case could be cited, in which the doctrine of precatory trust has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

"Now these rules are clear with respect to the doctrine of precatory trusts that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker—to be imperative words.

"Their Lordships think that substantially the words 'when no longer required by her' must, in this will, be taken to have the same meaning as if he had said, 'I give to my children so much as not required by her.' Considering the nature of the property, etc. their Lordships cannot come to any other conclusion than the testator intended his wife to use property according to her requirements. That is equivalent to an absolute gift to the wife."

#### TRUSTS ARISING BY THE OPERATION OF LAW

Trusts falling under this head are : (i) Implied Trust including Resulting Trust ; and (ii) Constructive Trust. The nature and scope of these trusts have been considered fully under the chapter on classification of trusts. The

present investigation, viz. how does such a trust arise, has also, in a general way, been considered already. The earlier observations on these trusts need, therefore, be made use of in covering the subject-matter of the present enquiry. It need here be mentioned that these trusts have been provided for by sections 88 to 96 of the Indian Trusts Act under the name "Of Obligations in the Nature of Trusts". These sections mainly specify the different cases or circumstances in which one or the other of such trusts may or do arise.

### Implied Trusts

An implied trust, as explained earlier, is one which arises from an equitable presumption made by the Court on the basis of the facts and circumstances of the case with special reference to the relationship of the parties. Like an express trusts an implied trust arises from the intention to that effect of the owner of the property. Such an intention being unexpressed, it is left to the Court to find out whether or not there is, or could be, in a particular case, the requisite intention in favour of trust. The Court discharges this function with the aid of certain presumptions of such an intention which would, unless rebutted, prevail, giving rise to a trust. The underlying principle is that if the owner of property has transferred it to another and there are no express words to indicate whether the transferee was to take as an absolute owner or only as a trustee, it would be fair and equitable to presume *prima facie* the latter. Such a situation may arise at the very inception of the transfer or it may arise subsequently. It may be the result of omission, lack of foresight or unknown circumstances. In each case the problem is to discover the beneficiary and, in the absence of anything to the contrary, *i. e.* the beneficiary is the settlor or his legal representative. The four classes of cases in which such a presumption is made in equity have been considered already.<sup>11</sup> One of these is the case of a transfer of property without consideration and we have seen<sup>12</sup> on what principle and under what circumstances the ordinary presumption of a trust in such cases is affected or rebutted by the presumption of advancement.

### Constructive Trusts.

As stated earlier a constructive trust is one which the Court elicits by a construction put upon certain acts of parties. Such a construction has no reference to the intention, either express or presumed, of the parties but is based on the principle of justice and good conscience. It arises wherever a person has acquired some property or gained some advantage which, on equitable considerations, he ought not to have acquired or must not be allowed to retain and he is accordingly constrained to keep it for or hand over to those who may be equitably entitled to it. Such cases, stated in general terms, are those which involve a breach of confidence or duty or amount to an abuse of some privilege or position. It may be added that a constructive trust does not necessarily imply a bad faith or an impropriety of conduct, *e. g.* where the innocent vendor becomes constructive trustee for the purchaser. It is further noticeable that it may be inequitable either to have acquired some property or advantage or it may be so only with regard to retaining it. A constructive trust arises in a variety of different relationships which may, in accordance with the classification made by Underhill,<sup>13</sup> be considered under the following heads :

#### (1) *Constructive trusts of profits made by persons in a fiduciary position.*—

11. See. pp. 209-210 *supra*.

12. See *supra*.

13. Underhill on Trusts and Trustees, 6th ed., pp. 134-144.



The leading case on the point under English law is *Keech v. Sandford*.<sup>14</sup>

Here a lessee of the profits of a market had devised the lease to a trustee for an infant. On the expiration of the lease, the trustee applied for a renewal; but the lessor would not renew, on the ground that the infant could not enter into the usual covenants. Upon this the trustee took a lease to himself for his own benefit. It was held that, though the trustee had acted with perfect honesty he remained the trustee of the lease for the infant and that he must assign the lease to him and account for the profits. Lord King, L. C., cynically remarked, "I very well see, if a trustee, on the refusal to renew, might have a lease to himself few trust estates would be renewed to *castui que use*."

The doctrine is really a corollary of the broad principle that a person in a fiduciary position should not place him himself in a position in which there is a conflict between his duty and his interests. It is not confined to trustees properly so called; but extends also to other persons who clearly occupy a fiduciary position. Thus it applies to an executor, administrator and agent. Cases of qualified owners are also covered by this rule and a constructive trust would accordingly arise also in case of a tenant for life, a co-owner, partner, mortgagor and mortgagee. But in the latter class of cases the doctrine applies only in a limited form. In the former class of cases the presumption against the validity of the transaction is absolute and irrebuttable, while in the latter class of cases there is no irrebuttable, presumption of law against the validity and they can be allowed to retain the benefit by showing that they did not in any way abuse their position or in any way intercept the advantage from others.

In India, a leading case on constructive trusts falling under this category is that of *Gopi Narain v. Kunj Behari Lal*.<sup>15</sup>

In this case Kunj Behari Lal was the Vice-President and general attorney of the Board of Trustees. There was an auction sale in execution of a simple money decree held by the trustees as such of a mortgage bond comprising, among other properties, a village of which two-thirds formed part of the trust property. The purchase of the bond was thus admittedly in the interest of the trust so that the whole village might become the trust property. The plaintiff himself advised the board of trustees about the desirability of the purchase. The trustees intended to purchase but could not take effective steps in that direction and the plaintiff purchased the bond at a very low price on his own account and for his own benefit.

The question arose whether the plaintiff could, under these circumstances, retain the benefit of his purchase?

The Court was doubtful whether the plaintiff intended to purchase the bond for himself or for the trust but it appeared "most probable that having succeeded in purchasing the bond at a very low price, he was determined to keep it for himself". It was held that the plaintiff having entered into dealings where his own interest was in conflict with his duty, must hold the property as a constructive trustee for the benefit of trust. He was, of course, held entitled to the purchase money and the reasonable expenses incurred in acquiring the property.

Section 90 of the Indian Trusts Act, 1882, provides for a constructive trust once advantage gained by mortgagee among other fiduciaries and

14. (1726) Sel. Ch. Ca. 61.

15. (1912) 34 All. 306.

illustration (c) specifically lays down that where the mortgagee entering into provision of the mortgaged property allows revenue to fall into arrears with a view to purchase the same when put up for sale in discharge of the arrears, he would even after purchase hold the property for the benefit of the mortgagor subject to his right of reimbursement. In *Sachidanand v. Sheo Prasad*,<sup>15a</sup> the Supreme Court held that where the mortgaged property formed a portion of the larger holding, the payment of rent was payable partly by the mortgagor and partly by the mortgagee. The default in payment of rent on the part of the mortgagor was in its entirety and that on the part of the mortgagee only of a trifling sum (i. e., 14 as out of 33-14-9 and 10 as 9 pies out of 68-10-9 payable by the mortgagee) and where there was no *mala fide* or ulterior motive on the part of the mortgagee, the provisions of Section 90 read with illustration (a) of the Trusts Act were not attracted so that the purchase would not ensure for the benefit of the mortgagor and the suit for redemption must fail.

(2) *Constructive trusts where equitable and legal estates are not united in the same person.*—Where a person in whom the property is vested, has not the whole equitable interest therein, he is *pro tanto* a trustee of that property for the persons having such equitable interest. Mention under this head may be made of :

- (a) *Relation of vendor and vendee in case of invalid or incomplete sale.*—In such cases the vendee or the vendor, as the case may be, is a constructive trustee of the property transferred or to be transferred and the consideration for the transfer in pursuance of such contract of sale. So, if there is a valid contract of sale of land, the vendor is the constructive trustee of the land for the vendee while the vendee would be constructive trustee of the consideration. The position would be the same if the sale has been effected completely but cannot stand because it is invalid or illegal.
- (b) *Trust funds received by a stranger.*—Where a stranger receives trust property in breach of the trust with notice, actual or constructive, of the same, he is constructive trustee of such property, e. g. X would be a constructive trustee of the trust property purchased by him if he knew that the trustee had no power or warrant.

The following points need be noted regarding the implied, resulting and constructive trusts :

- (i) The legal requirements as to formalities for the creation of an express trust do not apply to these trusts and their creation or operation is unaffected by the absence of those formalities.
- (ii) The principles applicable to an express simple<sup>16</sup> trust generally apply to these trusts as well.
- (iii) The person holding property under any of these trusts must, so far as may be, perform the duties and be subject to the same disabilities and liabilities as a trustee<sup>17</sup> in case of an express trust.
- (iv) The person holding property under any of these trusts is, unless there is anything to suggest to the contrary, entitled to reasonable compensation and repayment of any expenses properly incurred.

15a. A. I. R. 1956 S.C. 126.

16. See pp 226-227 supra.

17. See Section 95, Indian Trusts Act, 1882.

## CHAPTER XXIV

### THE APPOINTMENT AND DISCHARGE OF TRUSTEES

As observed earlier when a person is appointed a trustee, he is at liberty either to accept or not to accept the appointment. But if he chooses to accept it he becomes bound not only with the duties annexed to that office but with office itself and it is not open to him to renounce the same at his pleasure nor, indeed, can he be removed from the office arbitrarily. The first question that arises or may be considered under this head is that regarding the discharge of a trustee. If no trustee has been appointed or the sole trustee or all the trustees decline to accept the responsibility or a trustee after accepting and acting as such is discharged from the office, the question of appointment of a trustee in his place arises and this may be taken up as the second head of enquiry. Generally, the trust deed lays down an elaborate provision for the discharge and appointment of trustees which is ordinarily followed and there is no difficulty. It is, generally speaking, only when no such provision has been made or the provision is not complete or is or has become incapable of taking effect that these questions become important and worthy of investigation. In the third place it need be considered as to what is the effect of the discharge or appointment of a trustee on the trust or the surviving trustees. Provisions on all these matters have been made under Sections 70-76 of the the Indian Trusts Act, 1882 and these are almost identical with those under English law.

#### Discharge of trustee.

A trustee may be relieved from his office either by his death or by his discharge from office. A discharge from office may be effected either by retirement or by removal.

#### Retirement.

A trustee may, as laid down by Section 71 of the Indian Trusts Act, retire from his office, in one of the following ways :

- (a) by the extinction of the trust ;
- (b) by the completion of his duties under the trust ;
- (c) by such means as may be prescribed by the instrument of trust ;
- (d) by the appointment under this Act of a new trustee in his place ;
- (e) by consent of himself and the beneficiary or, where there are more beneficiaries than one, all the beneficiaries, provided they are competent to contract ; or
- (f) by the Court to which a petition for his discharge is presented under this Act.

A trustee seeking discharge from his office may, as provided for by Section 72, apply by petition to a principal Civil Court of original jurisdiction and if the Court is satisfied that there is sufficient reason, *e. g.* disability to give the requisite attention on account of illness, *etc. i. e.*, some cause beyond his control for such discharge, it may discharge accordingly, and direct his costs in these proceedings to be paid out of the trust property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place,

The difference between cases where, in the view of the Court, there is sufficient reason for discharge and those where there is no such reason is that in the former the trustee *may* be relieved at once while in the latter he *cannot* be relieved unless a suitable substitute has been found and appointed. The other difference is that in the former he is entitled to his costs but not so in the latter.

### Removal.

A trustee may be removed from his office—

- (x) By the lawful exercise of an express power vested in any one under the trust instrument ;
- (y) *By the order of the Court under its jurisdiction over the execution of trusts.*—The Court has an inherent jurisdiction to remove a trustee. As the interests of the trust are of paramount importance to the Court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. The grounds for the Court's interference have been classified by Strahan<sup>1</sup> under three heads :
  - (a) Want of honesty ;
  - (b) Want of reasonable capacity ;
  - (c) Want of reasonable fidelity.

The second of these has a very wide scope and some of the cases falling under it are<sup>2</sup> : where the trustee (i) is for continuous period of six months absent from India. This period under English law is twelve months ; (ii) leaves India for the purpose of living abroad ; (iii) is declared an insolvent ; (iv) becomes old and infirm ; (v) accepts an inconsistent trust.

“The reason for the removal of a trustee who becomes insolvent”, says Jessel, M. R., “is obvious. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy ; and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of others.”<sup>3</sup>

Retirement and removal through Courts cover some common ground, *e. g.* old age and infirmity and the only difference between the two in such cases is that one is voluntary and on the desire and request of the trustee while the other is compulsory and against the desire and the request of the trustee.

A trust may be revoked :

- (i) at the pleasure of the testator, where the trust is created by a will.
- (ii) A trust otherwise created can be revoked only—
  - (a) where all the beneficiaries are competent to contract—by their consent ;
  - (b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust, or
  - (c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

1. Strahan's Digest of Equity, 3rd, ed., p. 92.

2. See Section 73, Indian Trusts Act, 1882.

3. *Re Barkar's Trusts*, (1875) 1 Ch D. 43 followed in *Satya Kinkar v. Kiron Chandra*, A. I. R. 1954 Cal 432 where it was held that the insolvency of the trustee would not *inso facto* discharge him from office. He remains competent to work unless removed

### Appointment of a trustee.

Where it is desired to appoint new trustees in substitution for or in succession to original or other trustees such appointment may, as provided for under Section 73 of the Indian Trusts Act, be made—

- (i) by the person, if any, who is by the trust instrument nominated to appoint new trustees ; or
- (ii) by the author of the trust if he be alive and competent to contract ; or
- (iii) by the surviving or continuing trustees or trustee ; or
- (iv) by the legal representative of the last surviving or continuing trustee ; or
- (v) *with the consent of the Court*, by the retiring trustees if they all retire simultaneously ; or
- (vi) *with the consent of the Court*, by the last retiring trustee.

The power of nomination of a trustee detailed above is to be exercised in the order given. Each class of person has a superior or preferential power than the one following it and it is only when there is no such person to nominate in the preceding head or such person is unable or unwilling to act, that the power vests in and may be exercised by those in the lower class. Every such appointment must be by writing under the hand of the person making it.

If no appointment of a trustee under any one of the foregoing provisions is or can be made, the trustee is appointed by the Court. The principles upon which the Court acts in appointing new trustees were thus stated by Turner, L. J., in *In re Tempest*.<sup>4</sup>

“It was said in argument, and it has been frequently said, that, in making such appointments, the Court acts upon and exercises its discretion ; and this, no doubt, is generally true ; but the discretion which the Court has and exercises in making such appointments, is not, as I conceive, a mere arbitrary discretion, but a discretion in the exercise of which the Court is, and ought to be, governed by some general rules and principles ; and, in my opinion, the difficulty which the Court has to encounter in these cases lies not so much in ascertaining the rules and principles by which it ought to be guided as in applying those rules and principles to the varying circumstances of each particular case. The following rules and principles may, I think, safely be laid down as applying to all cases of appointments, by the Court, of new trustees :

“*First*, the Court will have regard to the *wishes of the persons by whom the trust has been created*, if expressed in the instrument of trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited ; and I do not think that upon a question of this description any distinction can be drawn between express declarations and demonstrated intention. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.

"Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestui que trustent*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties' interest under the trust. Every trustee is in duty bound to look to the interest of all, and not of any particular member or class of members of his *cestui que trustent*.

"A third rule which, I think, may safely be laid down, is this—that the Court, in appointing a trustee, will have regard to the question, whether his appointment will promote or impede the execution of the trust for the very purpose of the appointment is that the trust may be better carried into execution."

The Indian Trust Act, in making a provision on this point through Section 74, has adopted these three rules and enacted them under four heads, splitting the first into two. It provides that in appointing new trustees, the Court shall have regard—

- (a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust ;
- (b) to the wishes of the person, if any, empowered to appoint new trustees ;
- (c) to the question whether the appointment will promote or impede the execution of the trust ; and
- (d) where there are more beneficiaries than one, to the interest of all such beneficiaries.

#### Effect of the appointment and discharge of trustees.<sup>1</sup>

The trust property vests in the trustees—or such of them as accept the appointment—by and from the time of their accepting the office which may be done through express words to that effect or by conduct or by actual performance of the duties. If a trustee disclaims the trust which he is competent to do and which may be and usually is—as a matter of caution and to avoid the possibility of any liability for breach of duty—in writing or which may be simply by conduct, the trust property vests in such of the trustees alone as accept the office and they can unless there is anything to the contrary in the trust deed, perform all the functions of a trustee as if they were the only trustees appointed under the trust instrument.

When a trustee is discharged from office, the property vests in the surviving or continuing trustees and they can<sup>2</sup> and would, unless there is anything to the contrary, continue to perform and exercise all the duties and powers and carry out the object of the trust as if they had been the sole trustees under the trust. So, where the exercise of a power requires, under the trust instrument, the concurrence of five trustees and there are only four trustees left, this power cannot be exercised by the remaining trustees.

When a new trustee is appointed the trust property vests in him together with the existing trustees and he has the same powers authorities and discretion and shall in all respects act as if he had been an original trustee.

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5. See Sections 75 and 76 of the Indian Trust Act, 1882.

6. Section 44, Indian Trust Act, 1882.

## CHAPTER XXV

### THE DUTIES AND LIABILITIES OF TRUSTEES

As soon as the trustee accepts the office, he must bear in mind that he is not to sleep upon it but is required to take an active part in the execution of the trust. In a general sense, a trustee is bound by his implied obligation to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken. But as he is supposed merely to take upon himself the trust as a matter of honour, conscience, friendship or humanity and as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose, he would seem, upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence, and as in the case of a gratuitous bailee, liable only for gross negligence. It would be difficult, however, to affirm that Courts of equity do in fact, always limit the responsibility of trustees, or measure their acts by such a rule.

Chapter III of the Indian Trust Act, 1882, including Sections 11 to 30 lay down the duties (Sections 11-22) and liabilities (Sections 23-30) of trustees and these may be considered separately.

#### (A)

#### THE DUTIES OF A TRUSTEE

The duty of a trustee is an absolute obligation to do or to abstain from doing a certain act. When the obligation is to do the act it is a positive duty. When the obligation is to abstain from doing the act it is a negative duty and this is here and under the Indian Trust Act considered under the head of disabilities. The failure to perform a positive duty or to observe a negative duty is called a breach of trust. The duties of a trustee may be stated as follows :

1. To take hold of the trust.<sup>1</sup>—The most elementary duty of a trustee is to acquaint himself, as soon as possible, with the terms of the trust, the nature of the trust property and all documents relating to the trust and must take reasonable steps to recover and secure all property and investments.

2. To obey all directions under the trust instrument.<sup>2</sup>—A trustee is bound to carry out the directions of the author of trust given at the time of its creation except where :

- (i) it is impracticable, illegal or manifestly injurious to the beneficiaries ;
- (ii) it is modified by the consent of all the beneficiaries collectively, provided they are all competent to contract, or
- (iii) a departure from such directions is sanctioned by the Court.

This is the most important of all the rules relating to the duties of. Trustee. It is founded on common sense as displayed in the phrase, "He who plays the piper calls the tune", and overshadows and modifies all other rules, which must be read as if they contained an express declaration that they are subject to any

1. Section 12 of the Indian Trust Act, 1882.

2. Section 11 of the Indian Trust Act, 1882

provisions to the contrary contained in the settlement itself. So where A, a trustee, is simply authorised to sell certain land by public auction he cannot sell the land by private contract. Similarly, if there are conditions (*e. g.*, obtaining someone's consent before doing a particular act) attached to the exercise of any of their functions, the trustees must strictly perform those conditions.

It is, however, important to note that the trustee is bound by such directions of the settlor as have been given at the time of the creation of the trust. After the creation of the trust, the settlor ceases to have any interest in or control over the trust property and as such any direction given by him thereafter has no value or force.

The general rule is clear enough. We may now take up the three exceptions noted above :—

- (i) The trustee can execute the trust only in so far as it is practical and legal. So, where the trust deed directs an immediate sale of certain properties and no purchaser can be found, the direction being impracticable need not be performed. Similarly, if there is a direction to give annuities to future illegitimate children or a direction postponing the enjoyment of some property or fund for an indefinite time, the direction being illegal cannot be performed. So also, if a trustee has been directed by the author of the trust to lend the trust-property to X on the security of a bond by him and X becomes insolvent, the trustee should refuse to follow his direction.
- (ii) The trust being exclusively in the interest of the beneficiaries, can be controlled by the beneficiaries if they are *sui juris* and of one mind. The trustee is, therefore, bound to comply with the directions of the beneficiaries collectively even if they are inconsistent with or opposed to those in the trust instrument. A, a trustee of certain land for X, Y and Z, is authorised to sell the land to B for a specified sum. X, Y and Z, being competent to contract, consent that A may sell the land to C for a less sum, A may sell the land accordingly.
- (iii) Down to the middle of the year 1901 it was very doubtful in England as to what extent the Court had jurisdiction to sanction any departure from the terms of a trust, however beneficial it might be for the beneficiaries. The general jurisdiction of the Courts in this sphere was, however, established by the leading case of *Re New*,<sup>3</sup> where the Court of Appeal authorized the trustees of three separate trust instruments to concur in a share-holder's scheme for the reconstruction of a limited company under which shares settled in *specie* were to be exchanged for shares in the new company which the trustees were not, by their settlements, authorized to hold. Romer, L. J., in delivering the judgment of the Court said, "As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the trust instrument creating the trust authorized by its terms.....In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, [and the

3. (1901) 2 Ch. 534.



consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris*, or in existence, then it may be right for the court, and *the court in a proper case would have jurisdiction* to sanction on behalf of all concerned such acts on behalf of the trustees.....] By way merely of illustration we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death ; and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale. In such a case the court would have jurisdiction to authorize, and would authorize, the trustees to postpone the sale for a reasonable time.....Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers.....it need scarcely be said that *the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate.....*But each case brought before the court must be considered and dealt with according to its special circumstances."

In England the point has now and to a good deal been covered by the Trustee Act, 1925. Section 57 of which provides that where in the management or administration of any property vested in trustees any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition or expenditure, or other transaction, is in the opinion of the Court expedient (for the trust as a whole), but cannot be effected by reason of the absence of any power for that purpose vested in the trustees, the Court may by order confer upon the trustees the necessary power for the purpose. The statutory power has been used for such matter as to authorize the sale of chattels settled on trusts which prevent sale, the sale of land where a consent requisite to sale has been refused, the partitioning of land where there was no power to partition it.

The nature and limits of the court's jurisdiction in the execution of trusts came in for adjudication by the House of Lords in *Chapman v. Chapman*<sup>4</sup> where the court refused to sanction a rearrangement of the trust settlement in favour of a minor for the purpose of securing an adventitious benefit of avoiding the payment of estate duty. It was laid down that mere expediency was not enough to found the jurisdiction to alter or rearrange the trusts. That power was limited to the following cases (i) to change the nature of the infant's property from real to personal estate and *vice versa* ; and this jurisdiction was to be so exercised as to preserve the rights of testamentary disposition and succession ; (ii) to provide maintenance for an infant and, rarely, for an adult beneficiary ; (iii) to direct, in the administration of trust property, that by way of salvage some transaction unauthorised by the trust instrument should be carried out.

It may be submitted that Section 11 of the Indian Trust Act defines the Court's jurisdiction in this sphere literally in terms of a portion of the observations (enclosed in brackets) in the above judgment of Romer, L. J. and does not go to the whole length of the ruling. After specifying the power of the beneficiaries to modify the directions of the settlor, it only says :

"Where the beneficiary is incompetent to contract, his consent may,

4. [1954] A. C. 429.

for the purposes of this section, be given by a principal Civil Court of original jurisdiction."

In *Datt Kumar v. Nadyani*,<sup>4</sup> it was held that what counts is the true intention of the settlor. Once that is satisfactorily established, the mere fact that the trust deed conveys by way of settlement the trust property irrevocably does not mean that the deed cannot be reformed. If a clear mistake is noticeable and the intention of the settlor is manifestly not what the deed expresses it to be, irrevocability can be no bar to the deeds rectification.

3. To protect title to trust-property.<sup>5</sup>—A trustee is bound to maintain and defend all suits in the interest of or in relation to the trust and to take such other steps as may be reasonable and necessary for the preservation of the trust property and the assertion or protection of the title thereto.

It is the duty of the trustee to place the trust property in a state of security and for that purpose to take all possible and reasonable steps, litigious or otherwise. Thus, where the trust property is immovable property which has been given to the author of the trust by an unregistered instrument, it is the trustee's duty to cause the instrument to be registered. Similarly, if the trust fund be a thing in action which may be reduced to possession, it is the trustee's duty to get it in. Again where the trust property consists of a vacant land it is the duty of the trustee to let it or keep it in a proper state of cultivation.

4. To be impartial.<sup>6</sup>—When there are more beneficiaries than one, the trustee must be impartial in the execution of the trust and not execute the trust for the advantage of one at the expense or to the disadvantage of another.

5. To convert perishable property.<sup>7</sup>—Where a trust is created for the benefit of several persons in succession, and the trust property is of a wasting nature or a future or reversionary interest, the trustee is bound to convert that property into property of a permanent and immediately profitable character, unless,

- (i) the will contains a direction or implication to the contrary ; or
- (ii)<sup>8</sup> the will confers on the trustee a discretion to postpone such conversion, which he *bona fide* and impartially exercises.

This rule is, in substance, only a corollary of the principle of impartiality stated under the preceding head, because, if wasting property (such as leaseholds, terminable securities *etc.*) were to be retained, the tenant for life would profit at the expense of the remainder-man ; and if reversionary property were not converted, the remainder-man would profit at the expense of the tenant for life.

This duty of the trustee, laid down in Section 16 of the Indian Trust Act, is based on and is called the rule in *Howe v. Lord Dartmouth*.<sup>9</sup> The principle is thus expressed in *Hinves v. Hinves*.<sup>10</sup> "The result of the rule laid down by Lord Eldon in *Howe v. Lord Dartmouth* and by Lord Cottenham in *Pickering v. Pickering*,<sup>11</sup> is that where personal estate is given in terms amounting to a

4a. 1970 Cal. 292.

5. Section 13, Indian Trust Act, 1882.

6. Section 17, Indian Trust Act, 1882.

7. Section 16, Indian Trust Act, 1882.

8. See para. 2 of Section 17 of the Trust Act.

9. 7 Ves. 137.

10. 3 Ha. 609, 611.

11. 4 My & Cr. 289.

general residuary bequest to be enjoyed by persons in succession, the interpretation which the Court puts upon the bequest is that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court as a general rule converts into permanent investments as much of the personality as is of a wasting or perishable nature at the death of the testator, and also reversionary interests."

Thus, where A bequeaths to B all his property in trust for C during his life, and on his death for D, and on D's death for E and A's property consists of three leases of leasehold houses say for 60 years, B should, unless there is anything in A's will to show that he intended the house to be enjoyed in *specie*, sell the houses, and invest the proceeds in some security bearing the permanent income so that the benefit of the trust property may not be exhausted by B or C but may be available to all the beneficiaries equally and equitably.

Similarly, if the trust property, instead of being a leasehold, is a reversionary interest which would accrue to the trust fund, say after 50 years, this interest should be sold and invested in a permanent security so that B or even C (in the above example) may not be deprived of its benefit.

It need be noted that the rule is confined only to property settled by will with regard to which a testator cannot be presumed to foresee its nature; settlement of existing property by deed is necessarily specific and therefore excluded from the rule.

As stated earlier, the duty to convert may be excluded either by an express direction to the contrary in the will or by sufficient indication in the will of the testator's intention to the contrary.

So, there will be no duty on the trustee to convert if the testator expressly authorises the retention of all the trust property in whichever form they may be. Again, where A bequeaths his three leasehold houses in Calcutta together with the furniture in trust for C during his life, and on his death for D and on D's death for E, an intention that the house and furniture should be enjoyed in *specie* appears clearly and B should not sell them.

Similarly, when a discretion to convert or not is expressly given to the trustees, the Court will not interfere with it so long as the trustees exercise it reasonably and in good faith. Thus where a testator gave his residuary estate, which included several leasehold house (held upon short terms), to trustees upon trust to pay the income to his wife for life with remainder to his grandchildren, and gave his trustees power to retain any portion of his property in the same state in which it should be at his decease, or to sell and convert the same as they should think fit, it was held that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property and the trustees were at liberty to hold the property as they liked.

The duty of conversion under *Howe v. Lord Dartmouth* applies unless there is sufficient indication of intention to exclude it and the burden of proof in every case rests upon the person who says that it is not to be applied.

6. To prevent waste.<sup>12</sup>—Where the trust is created for the benefit of several persons in succession and one of them being in possession of the trust property commits or threatens to commit any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

12. Section 18, Indian Trust Act, 1882.

The principle is that the life tenant is entitled to enjoy the income of the property alone and must not do any act which injures the interest the remaindermen in the property *e. g.* if he cuts timber or sells them away, such acts of the life-tenant are known as waste. Accordingly, in a trust it is the duty of the trustee to prevent such waste in trust property so that the interest of the subsequent beneficiaries may not suffer. This rule does not, of course, apply if the waste is permissive *i. e.*, the result of ordinary user or one permitted to the life-tenant.

**7. To invest trust funds.**<sup>13</sup>—A trustee is bound, unless, of course, expressly forbidden by the trust instrument, to invest trust funds in his hands in such securities as are authorised by law. In India, Section 20 of the Indian Trust Act lays down the different securities in which the trustees must invest the trust fund which may be briefly referred to as follows :

- (i) Government securities of any of the State Governments or the Central Government of India or of the United Kingdom of Great Britain and Ireland ;
- (ii) Any security which is a charge on the revenues of India or any of the States in India ;
- (iii) Railway stock or stock of any other company whereon the interest is guaranteed by the Central Government ;
- (iv) First mortgage of immovable property situated in India.

The above provision does not<sup>14</sup> apply to (a) investments made before the Indian Trust Act, 1882 came into force : (b) an investment on a mortgage of immovable property already pledged as security under the Land Improvement Act, 1871 ; or (c) a case where the trust money does not exceed three thousand rupee and the deposit is made in Government Savings Bank.

The trustee's power to invest carries with it the power to vary investments from time to time.

**8. To abide by all interests under the trust.**<sup>15</sup>—A trustee, who has acknowledged himself as such, must not for him or another set up or add any title to the trust property adverse to the interest of the beneficiary.

**9. To maintain proper account**<sup>16</sup>—A trustee is bound (a) to keep clear and accurate accounts of trust property and (b) at all reasonable times at the request of the beneficiary to furnish him with full and accurate information as to the amount and state of the trust property.

It is common place that no trustee can get a discharge unless he renders accounts of his management. An ex-trustee is therefore, liable to render account of his management to the present trustees. This liability is irrespective of any question of negligence, a wilful default. The question with regard to the period of this liability depends upon and must be fixed according to the facts and circumstances of each case. It does not, however, follow that relief as to accounts will be given after great lengths of time, it being the constant course of courts of equity to discourage slab demands.<sup>16a</sup>

**10. To exercise reasonable care.**<sup>17</sup>—A trustee must, in the execution of the trust, use such due diligence and care as men of ordinary prudence and vigilance would use in the management of their own affairs.

13. Section 20, Indian Trust Act, 1882.

14. Section 21, Indian Trust Act, 1882.

15. Section 14, Indian Trust Act, 1882.

16. Section 19, Indian Trust Act, 1882.

16a. See *V. L. N. S Temple v. Pattabhivanl*, A. I. R. 1967 S. C. 781.

17. Section 15, Indian Trust Act, 1882.

This is a rule laying down the standard of care required of the trustee and is, in general, relevant to all the duties which are not absolute. Wherever the question arises whether the trustee has discharged a particular duty it will be decided in reference to the question whether he has done all that any man of ordinary prudence and vigilance would have done in that situation or under those circumstances; and if he has, it would be sufficient discharge of his obligation under the trust and he would not be accountable or liable for the deterioration, loss or destruction of the trust property on that account.

"As a general rule", observed Lord Blackburn, "a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own", with the exception that he "must not choose investments other than those which the terms of his trust permit."<sup>18</sup>

So, a trustee will not be liable if the trust property be stolen, provided he has taken reasonable care of it even though the thief be his own servant, if, on the facts proved, it appears that the trustee was justified in having on suspicion of that kind against the servant.

Similarly, where A, a trustee of leasehold property, directs the tenant to pay the rent on account of the trust to a banker, B, then in credit, and rents are accordingly paid to B and A leaves the money with B only till wanted, A will not be bound to make the loss if B becomes insolvent before the money is drawn, provided A had no reason to believe that B was in insolvent circumstances.

But if, on the other hand, the trustee has not, in the discharge of his duty acted like an ordinary reasonable man, he would be deemed to have committed a breach of duty and be liable for the resultant loss to the trust estate.

Thus where A, a trustee for B, in execution of his trust, sells the trust property, but from want of due diligence on his part fails to receive part of the purchase money, he is bound to make good the loss to B.

Similarly, where a trustee directed to sell the trust property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition, he would be bound to make good the loss caused thereby to the beneficiary.

The rule is simple and clear but the difficulty lies in its application in a particular case and nothing can be said towards solving or simplifying that difficulty which is apparent from the following observations on the point:

"Where the trustee has in any given instance employed reasonable care, prudence and intelligence in coming to a decision is purely a question of fact. To cite authorities as is often done, to show what amounts to reasonable care, prudence or intelligence, is, it is submitted, a misleading and dangerous practice. It is an attempt to decide a point of fact, not by evidence, but by authority, and tends to the establishment of a doctrine of constructive want of care, *etc.*, similar to the venerable but exploded doctrine of constructive fraud".<sup>19</sup>

It need, however, be noted that the fact that a trustee is remunerated does not increase the extent of care to be shown by him or add to his liability. But if a trustee's function involves some professional skill or knowledge and there is a contractual obligation to that effect, the care of an ordinary reasonable man would not do and it must be one associated with or expected from men of that profession.

18. *Speight v. Gount*, 9 App. Cas 1.

19. *Strahan's Digest of Equity*, 3rd ed., p. 111.

## (B)

## THE LIABILITIES OF A TRUSTEE

**Grounds of Liability**

Liability presupposes the existence of some duty and the breach thereof. A trustee is, as specified earlier, subject to a large number and variety of duties and his failure to perform any one of those duties is called a breach of trust and the trustee renders him liable to the beneficiaries for every breach of trust. The Court does not, in this connection, inquire whether the trustee has derived any particular benefit, but fastens upon him an obligation to make good the situation of the beneficiary. "It has been the constant habit of Courts of Equity", said Lord Redesdale, "to charge persons in the character of trustees with consequences of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not."<sup>20</sup>

**Limitation of Actions**

If need be noted that limitation is a good defence to an action against a breach of trust except where the breach of trust is fraudulent and the trustee taking the defence is a party to it or where the suit is to recover trust property or its proceeds. As to the last, Section 10 of the Limitation Act, 1908, provides, that "no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

**Measure of Liability<sup>21</sup>.**

The general measure of a trustee's liability for a breach of trust is the loss caused thereby to the trust property. So, if a trustee for sale omits to sell property when it ought to have been sold, he is liable for the difference between the price for which it is sold and the price which would have been obtained on a sale at the correct time. Or, where the trustee sells, in breach of trust, a piece of land to a purchaser for consideration without notice of trust he is at the option of the beneficiary, liable to purchase other land of equal value for the trust or to pay the sale proceeds together with interest.

It must, however, be noted that the trustee is liable only for such loss as is attributable to the breach of trust. Thus, A, the trustee, wishing to advance trust money on the security of Blackacre, retains B, a competent surveyor, to value Blackacre. B values Blackacre at £ 9,000. On this valuation Blackacre is a proper security for £ 6,000, but A advances £ 7,000. If on sale Blackacre realises only £ 5,000, A will not be liable for £ 2,000 lost but only for £ 1,000, which was advanced over £ 6,000. The duty in question is to advance trust money on a proper security and the loss for the breach must be estimated at £ 1,000 and with regard to the rest £ 1,000, the position must be like one where though the trust money has been advanced on proper securities but on account of, say, accident, nothing is recovered.

**Liability to pay Interest.**

*As a general rule* it may be stated that a trustee is *not liable<sup>22</sup> to pay interest* on the loss caused by a breach of trust except under the following circumstances :—

20. Adair v. Shaw, 1 Sch. & Lef., 272.

21. See Section 23, Indian Trusts Act, 1882.

22. Section 23, Indian Trusts Act, 1882.

- (i) where he has actually received interest ;
- (ii) where the breach of trust consists in unreasonable delay in paying trust money to the beneficiary ;
- (iii) where the trustee out to have received interest but has not done so ; for example, if a trustee who, without proper authority, calls in trust property invested on mortgage at 5 per cent, he would be liable for that rate of interest ; for although he may not actually have received that rate, he would have done so but for the unauthorised act ;
- (iv) where he may be fairly presumed to have received interest, *e. g.* where the trustee has traded with the money ;
- (v) where the breach consists in failure to invest trust money, and to accumulate interest or dividends thereon.

As to the *rate of interest* which is chargeable from the trustee, Section 23 of the Indian Trusts Act, 1882, provides that the trustee is liable, in case (i) above, to the interest actually received and in other cases to a simple interest at the rate of 6% per annum unless the Court deems fit to direct to the contrary. Where the breach consists in failure to invest trust money and to accumulate the interest or dividends thereon, the trustee is liable to account for compound interest at 6% per annum with half yearly rates. These rates of interest relate to honest breaches of trust and are based on the actual amount of loss. But, if a trustee keeps the money fraudulently in his hands, meaning to appropriate it, the actual loss ceases to be the measure of liability and a higher rate of interest may be charged from the trustee.

A trustee is not liable for breach of trust if (i) the beneficiary has by fraud induced the trustee to commit the breach ; or (ii) the beneficiary being competent to contract has himself, without coercion or undue influence having been brought to bear on him,—

- (a) concurred in the breach, or
- (b) subsequently acquiesced therein. The principle underlying this exception is based on the observation made in *Waltor v. Symonds* which runs as under :

“If the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of a breach of trust. Further, either concurrence in the act, or acquiescence without original concurrence, will release the trustees, but that is only a general rule, and the court must enquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that enquiry, how important it is, on the one hand to secure the property of the *cestui que trust* and, on the other, not to deter men from undertaking trusts from the performance of which them seldom obtain either satisfaction or gratitude.”

#### No right to set-off.

Equity regards each fund held by the trustee as a specific thing, a composite whole which is the property of the beneficiary. Any gain made out of the trust property belongs to the beneficiary while any loss must be made good by the trustee. A trustee is, therefore, not entitled to set off the profits made in one improper transaction against the loss in another improper transaction.<sup>23</sup> The rule may be illustrated by the following example given by Dr. Hanbury<sup>24</sup>

23. Section 24, Indian Trusts Act, 1882.

24. Modern Equity, 4th ed., p. 315.

which he remarks "is a faithful, though somewhat far-fetched, parallel of the position taken up by equity against a trustee who attempts to set up gain against loss.

"If Peter leaves his dog and cat in the charge of Paul during his own absence abroad and Paul loses the cat, it will be idle for him to offer in her stead, to Peter on his return, a litter of puppies produced by the dog."

It is, however, important to note that the trustee is liable for actual loss in each distinct and complete transaction which amounts to a breach of the trust and not for the loss in each particular item of it. This rule is illustrated by the case of *Vyse v. Foster*.<sup>25</sup>

Here a testator devised his real and personal estate upon common trust for sale, making them a mixed fund. The trustees were advised that a few acres of freehold land under the trust might be advantageously sold in lots for building purposes, and that to develop their value, it was desirable to build a villa on the part of them. They accordingly built one at a cost of £ 1,600 out of the testator's personal estate. They did not sell the villa but let it at a rent of £ 30 a year. Subsequently, one of the beneficiaries filed a bill against the trustees praying (*inter alia*) that the expenditure of £ 1,600 was a breach of trust, and that it might be disallowed to the trustees in passing their account. The evidence showed that the outlay had benefitted the estate but Vice-Chancellor Bacon disallowed £ 1,600 as claimed by the beneficiary. The Court of Appeal (and subsequently the House of Lords), however, reversed this, the Lord Justice James saying, "As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, *bona fide* laid out on the other part of the estate, in exercise of their judgment as the best means of increasing the value of the whole."

### Nature of Liability.

The liability of trustees is joint and several.<sup>26</sup> Each trustee is in general liable for the whole loss when caused by the joint default of all the trustees even though all may not have been equally blameworthy; and a decree against all may be enforced against one or more only. Accordingly, where the judgment against two co-trustees is partly satisfied by one of them and the other becomes insolvent, the beneficiary may still prove in insolvency proceedings for the whole of the original judgment debt and not merely for the balance of it which remain unsatisfied. It is so because the insolvent trustee is equally liable for the whole judgment debt and the beneficiary's share in the assets of the insolvent must be determined on that basis, though he can, of course, actually recover more than the balance in case such sum is available on this account in the bankruptcy proceedings.

### Right to Contribution.

As amongst themselves, the trustees are entitled to contribution. The general rule is that the trustees must bear the burden equally, so that if one trustee pays more than his share he is entitled to claim contribution from the others. Thus, in *Jakson v. Dickinson*,<sup>27</sup> the trustees A and B invested, in breach of trust funds in partly paid-up shares. Some years after A's death, B, who had attempted but failed to dispose of the shares, had, on the company being wound up, to pay a call of £ 800 upon them. It was held that A's estate was

25. 8 Ch. App. 309.

26. Section 27, Indian Trusts Act, 1882.

27. (1903) 1 Ch. 947.



libale to contribute £ 400 towards this call, although the liquidator could not have such his personal representatives for it or any part of it.

It is important to note that the provisions of Section 27 of the Indian Trusts Act on this point are not clear. It may be split up under following three parts :

- (i) "As between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received to make good such loss ;
- (ii) "And if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.
- (iii) "Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

With regard to the second which may be taken to lay down the general rule as to contribution among trustees, it is submitted that it is wider than English law and goes further than what might have been actually contemplated. Under English law the rule as to contribution among co-trustees is applicable even though<sup>28</sup> one may be more blameworthy than the other. Thus in *Robinson v. Harkin*,<sup>29</sup> A, one of the trustees of a settlement, allowed his co-trustee B to have the trust fund to invest. B handed it to an "outside broker" who misappropriated parts of it. It was held that both the trustees were in *pari delicto*, and that B was, therefore, entitled to contribution from A, although he had taken a more active part in the transaction which led to the loss. The Indian Trust Act being obviously based on the English law,<sup>30</sup> it appears that the terms "equally guilty" were used merely to exclude (a) cases of fraud given under the third head ; and (b) cases falling within the exceptions allowed under Section 47 of the Indian Trusts Act.

With regard to the first which lays down the rule as to indemnity amongst trustees, it is submitted that it is also capable of being given a wider meaning than what was perhaps designed. The requisite of "less guilty" should be confined to cases where one of the trustees caused loss either (x) by his personal fraud, or (y) by his improper advice, he being a person on whose advice the other trustees were, under the law, entitled to rely, e.g. a solicitor.

The third is based on the common law doctrine that the law does not allow contribution between joint tortfeasors. The law called the rule in *Merryweather v. Nixan*<sup>31</sup> has been abolished in England by the Law Reforms (Married Women's and Tortfeasors) Act, 1935 and it may be<sup>32</sup> that in England contribution would be allowed even if all the trustees were guilty of fraud. How far does the Indian law on the point need a change may be worth consideration by the Indian Legislatures.

### NON-LIABILITY OF A TRUSTEE

There are certain cases in which a trustee is protected from liability for

28. Underhill on Trusts and Trustees, 6th ed., p. 404. Strahan's Digest of Equity, 3rd ed., p. 171.

29. (1896) Ch. 415.

30. The provisions of the Indian Trust Act may be compared with Underhill's Commentary on Trusts and Trustees.

31. (1799) 8 T R. 186.

32. Snell's Principles of Equity, 23rd ed., p. 192,

a breach of trust. In the following cases, subject to the limitation specified therein, a trustee will not be liable.

1. Breaches by a Co-trustee.<sup>33</sup>—In the absence of an express declaration to the contrary in the trust deed, a trustee is not liable for a breach of trust committed by his co-trustee except where :

- (i) he has delivered trust-property to his co-trustee without seeing to its proper application ;
- (ii) he has allowed his co-trustee to receive trust property without making due enquiry as to the co-trustee's dealings therewith or has allowed him to retain it longer than the circumstances of the case reasonably required ;
- (iii) he became aware of a breach of trust committed or intended by his co-trustee and either actively concealed it or did not within a reasonable time take proper steps to protect the beneficiary's interest.

The subject is governed by the decision in *Wilkins v. Hogg*,<sup>34</sup> and the above three exceptional circumstances wherein the trustee renders him liable were laid down by Lord Westbury. The general rule, as stated above, is subject to any direction to the contrary that may be given through the trust deed. In the above case, a testatrix, after appointing three trustees declared that each of them should be answerable only for losses arising from his own default, and not for involuntary acts or for the acts or defaults of his co-trustees and one of the trustees misapplied the trust fund, it was held that the co-trustees were not liable.

The liability of one trustee for his co-trustee's act or omission, under the above-mentioned circumstances, arises through the trustee's failure to perform his duty<sup>35</sup> of taking reasonable steps to recover all trust property and investments. Negligence is a breach of trust and if it is by the negligence of one trustee that another has been able to commit fraud, *etc.* to the detriment of the trust estate, the negligent trustee is liable not for the fraud of which he is wholly innocent but for his negligence which permitted it. The principle may be illustrated by means of an example.

A and B are trustees. A permits B to receive trust moneys. There is nothing wrong in this since trustees being by law joint tenants or tenants-in-common, every one by law may receive either all or as much of the profits as he can come by and it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and one put in trust out of other respects than to be troubled with the receipt of profits. But let us suppose that A also permits B to invest it on mortgage in B's own name. This is clearly a breach of duty to have all investments in his and B's joint names. If the mortgage debt becomes irrecoverable and B is declared an insolvent, A would be liable for the resultant loss to the trust estate.

It must be noted that a trustee who joins in signing a receipt merely for conformity without receiving the property, shall not by that circumstance alone be rendered liable<sup>36</sup> for a misapplication by the trustee who receives the property. The underlying principle of this rule is this. The receipt of one

33. Section 26, Indian Trusts Act, 1882.

34. 3 Giff. 116.

35. See. *supra*.

36. Section 26, Indian Trust Act, 1882 as also Section 30 of the Trustee Act (English), 1925.

co-trustee, unlike that of one co-executor, does not discharge a debtor who is paying over trust money. Now frequently it is difficult or impossible for all the trustees to receive jointly trust property, especially when such property is money. In such cases they may properly permit or delegate one of their number to receive it; and to give the payer a discharge they may join in the receipt given to him acknowledging payment. This is usually called joining for conformity only. But this immunity does not discharge the co-trustees from their duty to have the money, as soon as is reasonably possible, placed under their joint control.

2. Breaches by former or subsequent Trustees.<sup>37</sup>—A new trustee is not liable in respect of breaches of trust committed by his predecessors. Unless there are reasons to lead to the contrary, a trustee is entitled to presume that his predecessors performed their duties and got in all trust property. A retiring trustee remains liable for breaches of trust committed by him before his retirement, unless duly released, but he is not liable for breaches committed by his successors unless he retired for the purpose of enabling a breach of trust to be committed.

3. Concurrence of or release by the Beneficiaries.—“A beneficiary who has assented to, or concurred in, a breach of trust or who has subsequently released or confirmed it; or even acquiesced in it, cannot afterwards charge the trustees with it: Provided—

- ‘(a) that the beneficiary was *sui juris* at the date of such assent or release;
- “(b) that he had full knowledge of the facts and knew what he was doing and the legal effect thereof or has had and retains the benefit of the breach;
- “(c) that no undue influence was brought to bear upon him to extort the assent or release.”<sup>38</sup>

The law presumes that an infant has not the requisite discretion to judge and, therefore, he cannot lose his right to relief either by concurrence or release. In order that a release, concurrence or subsequent acquiescence may avail the trustee, it is necessary that the beneficiary must have had full knowledge of the facts and other circumstances of the case. So where, on the footing of a supposed illegitimacy, the title of a beneficiary to a trust legacy was disputed and denied by the trustee, and the former was thereby induced to accept from the trustee a smaller sum than that to which he was entitled under the will, and by deed, to release the trustee from the payment of the legacy, the Court would not permit the release to stand even after the lapse of more than twenty-five years.

But it seems that where a beneficiary has had the advantage of the breach of trust, then notwithstanding his want of knowledge of the breach, he cannot sue the trustee without replacing the amount which he himself has received by reason of the breach.

The above statement of the law on the point, which is a reproduction<sup>39</sup> from Underhill's commentary on ‘Trusts and Trustee’ and which may be taken to represent the English law on the point need be compared with similar provision under Section 23 of the Indian Trusts Act which lay down that the trustee is liable for a breach of trust unless :—

37. Section 25, Indian Trusts Act, 1882.

38. Underhill on Trust and Trustee, 6th ed., pp. 399-400.

39. Ibid.

- (a) "the beneficiary has by fraud induced the trustee to commit the breach, or
- (b) "the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or
- (c) "subsequently acquiesced therein with full knowledge of the facts of the case and of his right against the trustees."

It is submitted that there is hardly any material divergence between the English and the Indian law on the point, though it might appear at first sight that under the former the three conditions of exemptions are common to and necessary in all cases while it is not so in the latter. It is, for that purpose, necessary to note :

- (i) That the exemption from liability under the Indian law specified under head (a) is based on the principle of law laid down in *Gory v. Gerteken*<sup>40</sup> and *Overton v. Bannister*<sup>41</sup> that if an infant uses nefarious means such as representing himself of full age, in order to induce his trustee to pay trust money to him, cannot afterwards turn round and accuse the trustee who has in good faith made the payment, of a breach of trust. Accordingly, it is not necessary that the beneficiary in this case should be *sui juris* and of course it presupposes full knowledge of and absence of fraud against the minor.
- (ii) That in the Indian Trusts Act there is no provision with regard to express release by the beneficiary but it may seem to follow from that on acquiescence which is implied from conduct. It is true that for non-liability of the trustee on account of acquiescence of the beneficiary, the condition of the beneficiary being *sui juris* is not expressly laid down but the principles on which acquiescence is based or can be inferred in itself implies such condition.

**4. Release by the Court.**—In England, Section 16 of the Trusts Act, 1925 empowers the Court to relieve a trustee either wholly or partly from personal liability for a breach of trust if he "acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach." The Indian Trusts Act, 1882, does not make any specific provision on this point.

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40. (1816) 2 Med. 40.

41. (1859) 4 De. G. & J. 458

## CHAPTER XXVI

### THE RIGHTS AND POWERS OF TRUSTEES

The rights and the powers of the trustees have been laid down in Chapter IV of the Indian Trusts Act, 1882, covering Sections 31 to 45 of the same. These may here be taken up separately under two heads.

#### (A)

### THE RIGHTS OF TRUSTEES

The rights of a trustee may be considered under the following heads :

1. **Right to Title Deed.**<sup>1</sup>—A trustee is entitled to have in his possession the instrument of trust and all the documents of title, if any, relating solely to the trust property. It is difficult to understand why there is a specific provision under the Indian Trusts Act as to title-deeds without there being any with regard to the trust property itself. Either there ought to have been one for the property also otherwise the right to title-deeds ought to have been deemed to be covered by property and the whole right to have been left as one which is available under the general law on account of ownership. Anyway, since it is the right of the trustees to have possession of the title-deeds, they may sue to have them delivered up so that they may not be used otherwise and the trustees may be able to collect and secure trust property.

2. **Right to Re-imbursement<sup>2</sup> and Indemnity.**—The trustee has a right to re-imburse himself of all costs, expenses and liabilities properly incurred in administering the trust. For this purpose, though such expenses are primarily payable out of the corpus of the trust estate, the trustee has a first charge upon the trust property.

The trustee's right of indemnity is usually limited to the trust property ; but he is also entitled to indemnity against the beneficiary personally provided he is *sui juris* and has the sole beneficial interest under the trust and is not in a position to disclaim the beneficial interest in the trust.

In consequence of the rule that a trustee cannot make a profit from his trust, a trustee is not, in the absence of any provision or direction to that effect entitled to remuneration for his care, trouble and loss of time in administering the trust. This disability cannot, however, extend to expenses actually involved or incurred and hence the right to re-imbursement. "It is", said Lord Eldon, "in the nature of the office of a trustee, whether expressed in the instrument of trust or not, that the trust property shall re-imburse him of all the charges and expenses incurred in the execution of trust."<sup>3</sup>

The right of indemnity is not limited to the expenses incurred in recovering or managing the trust property or in protecting or supporting the beneficiaries but covers such liabilities which the trustee may incur in the due discharge of his duties under the trust. In *Benett v. Wyndham*,<sup>4</sup> a trustee in the due execution of his trust directed a bailiff, employed on the trust property, to have certain trees felled. The bailiff ordered the wood-cutters usually employed on the property to fell the trees. In doing so they negligently allowed a bough to

1. Section 31, Indian Trusts Act, 1882.

2. Section 32, *ibid*.

3. *Worral v. Harford*, 8 Ves. 8.

4. 4 D. F. & J. 259.

fall on a passer-by, who being injured, recovered heavy damages from the trustee in a Court of law. These damages were allowed to the trustee out of the trust property.

Two conditions must be satisfied in order to entitle the trustee to recover the expenses incurred. In the first place it must be in the execution of the trust and secondly it must be reasonable and proper in the circumstances in which it was incurred. Hence the Court will not allow a trustee his costs of defending a suit solely for the purpose of repelling charges of personal misconduct not directly related to the administration of or for the benefit of the trust. As a general rule, the payment by trustees of voluntary subscriptions for public or charitable objects is not allowed. But they may, nevertheless, be allowed in exceptional cases, for instance, where they are reasonable and made in the honest belief that the payment will benefit to the estate. In the same way, if the act or conduct of the trustee involving the expenditure in question though related to the administration of trust is found to be unnecessary, oppressive or unreasonably cautious he will not be entitled to indemnity. Accordingly, the expenses of a trustee's journey to Paris, in order that he might be present at the hearing of a suit brought in French Courts (the sole question being one of French law, and not of fact), were disallowed by the Court in England.<sup>5</sup> Similarly, if a litigation is speculative and, in the ultimate result unsuccessful, a trustee will usually not be allowed his costs, even though he acted in good faith under the advice of a counsel.<sup>6</sup>

A trustee is not deprived of his right to indemnity merely because he has committed a breach of trust if he is otherwise entitled to it. But he will not be allowed to receive the money by way of indemnity unless he has made good the loss caused to the trust property by the breach of trust.

A trustee is entitled to a lien upon the trust estate for all expenses properly executed in discharge of his duties under the trust. He may retain the trust deeds or retain the expenses out of income, until provision is made for raising them out of the corpus and the beneficiary cannot compel a conveyance until the lien is discharged, and this lien has a priority over costs of a suit or to any charge created by the beneficiary or existing under the trust.

The trustee's right to indemnity, though ordinarily recoverable from the trust estate is not always limited to it but extends further and imposes upon the beneficiary a personal obligation enforceable in equity to indemnify his trustee. It is, however, necessary that the beneficiary must be *sui juris* and entitled to the whole beneficial interest. The reason for confining this rule to such cases alone (*i. e.* a single adult beneficiary) was thus expressed by Lord Lindlay :

"It is quite unnecessary to consider in this case the difficulties which would arise if (the trustee held) .....on trusts for tenants for life or for infants or upon special trusts limiting the right to indemnity. In these cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the burdens incident to his legal ownership ; and the trustee accepts the trust knowing that *under such circumstances and in the absence of special contract* his right to indemnity cannot extend beyond the trust estate *i. e.*, beyond the respective interest of his *cestui que trusts*. In this case their Lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim."<sup>7</sup>

5. *Malcolm v. O'Callaghan*, 3 My. & Cr. 52.

6. *Re Yorke*, (1911), Ch. 370. *Re England*, (1918) 1 Ch. 24.

7. *Hardoon v. Bellios*, (1901) A. C. 118.

Where a beneficiary has only a limited interest in the trust property, he may become liable to indemnify the trustee if he expressly or impliedly contracts to do so e. g. where the beneficiary is the settlor and the trustee accepted office at his request. The requisite condition for the beneficiary's personal liability to indemnify the trustee is, under Section 32 of the Indian Trust Act, ensured by limiting it to such beneficiaries "on whose behalf he (the trustee) acted, and at whose request, express or implied, he made the payment". This section also makes an express provision for the trustee's right to indemnity against the beneficiary to whom an over-payment has been made by mistake.

**3. Right to Indemnity from Gainer by Breach of Trust.**<sup>8</sup>—A person other than a trustee, who has reaped the benefit of a breach of trust, must indemnify the trustee to the extent of the amount actually received by such person under the breach, unless the trustee, in committing a breach of trust, has been guilty of fraud.

In *Eaves v. Hickson*<sup>9</sup> trustees had paid over trust funds bequeathed to the children of one William Knibb, upon the faith of a forged marriage certificate which William Knibb produced to them from which it appeared that certain illegitimate children of his were legitimate. It was held that William Knibb, who had produced the certificate, must be made responsible for the money as well as the trustees. If the loss to the trust fund is realized from the trustee he has a right to recoup himself from William Knibb.

The scope of Section 34 of the Indian Trust Act, 1882 came up for adjudication by the Supreme Court after referring to the English Law on the point held (i) that where power to vary the quantum of interest of the beneficiaries, as reserved by the settlor in the Trust deed, could be exercised "by his instrument, by will alone and in no other way or act", the trustee (settlor) could not after that clause so as to exercise the power by a deed *inter vivos*, (ii) that the power of the Court under S. 34 limited one. "Under that provision, the Court has not been conferred with overall jurisdiction in matters arising under Trust deed. The statute has prescribed what the Court can do and.....what it cannot do". Power being limited to giving "Opinion advice or direction on any presented question respecting the management and administration of the trust property was not available and could not be utilised for allowing the trustee to revoke the clause limiting the exercise of power by means of a will and substituting the same by one of act *inter vivos*. The order of the Court in this case was, therefore, without jurisdiction and as such void. It was not permissible and could not be protected under section 43 of the Trustees and Mortgagees Powers Act, 1866. No such power is inherent either in the Court of Chancery in England or the Indian Courts, (iii) since the Official Trustee had merely carried out the order of the Court and it was not open to him to go behind that order, he could not be treated or held liable as a trustee. He is even empowered to re-imburse himself from the trust fund in his hands all the costs incurred by him in the case.

**4. Right to take Direction from Court.**<sup>10</sup>—A trustee is entitled, wherever it is reasonably necessary for his protection so to do, to apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust.

Formerly,<sup>11</sup> the only mode in which a trustee could, in case of difficulties

8. Section 33, Indian Trust Act, 1882.

9. 30 Beav 136.

10. Section 34, Indian Trust Act, 1882.

11. Strahan's Digest of Equity, 3rd ed., p. 146.

arising in the construction of the trust instrument or in the execution of, the trust obtain the protection of the Court, was by an action for the general administration of the trust estate, and advice on any particular point was not given by the Court as a rule until all the trustee's accounts had passed the master. Now a much simpler and cheaper mode of getting the directions of the Court is provided both in England and in India.

If the question is one of difficulty, detail or importance and not proper in the opinion of the Court for summary disposal, the application is not maintainable under Section 34 of the Indian Trust Act and regular proceedings would, in such cases, be necessary.

An order made or opinion given under this section and acted upon by the trustee shall be deemed to be a sufficient discharge of duty by the trustee and he will not be liable on that account.

In *Dalip Kumar v. Nandram*,<sup>11a</sup> it was made clear that section 34 of the Indian Trust Act made nothing more than an enabling provision and that the trustee was not obliged to apply for the direction of the Court in every case. It does not, for instance, take away or restrict the power of the trustee to expend money on repairs without the direction of the Court which is obviously available to him under section 36 of that Act.

**5. Right to Discharge.**—"When the duties of a trustee, as such, are complete, he is entitled to have the accounts of his administration of the trust property examined and settled and where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect."<sup>12</sup>

Obviously, in case of difference the accounts must be taken to and settled through a Court of law.

## (B)

### THE POWERS OF TRUSTEES

#### Distinction between Duties and Powers.

The duties of a trustee have been considered under the preceding chapter and before taking up their powers it appears necessary to explain the distinction between duty and power which has been very clearly stated in Strahan's Digest of Equity in the following words :

"What are usually called duties and what are usually called powers or discretions are both in their essence absolute duties. The difference between them does not lie in the nature of the obligation on the Trustee, but in the nature of the act he is obliged to do. In the case of duties he is bound to do the thing prescribed whether in his judgment it is wise to do or not. In the case of powers or discretions he is bound to exercise his judgment as to whether it is wise to do a thing or not and act accordingly. Thus, if £ 10,000 be vested in A upon trust to receive the income until B attains twenty-one years of age, and until then to pay the whole or such portion thereof as he may think proper for the maintenance and education of B and on B's attaining twenty-one to hand over to him the trust fund and all accumulations. A is (according to the terms of the trust deed) under two absolute duties and has one power or discretion. His absolute duties are to receive the income and to pay over the corpus of the trust fund and accumulations to B. These duties he must perform whether he thinks the settlor was wise in

11a. 1970 Cal. 292.

12. Section 35, Indian Trust Act, 1882.



making such provision for B or not. His discretion is as to the amount which is to be devoted to the maintenance and education of B during his minority. Here his duty is to decide how much of the income, if any, may, in his judgment be wisely devoted to this subject. He has no right to hand over the whole or any part of the income without considering whether the money is wisely spent or not any more than a jury have a right to decide by lot what their verdict shall be."<sup>13</sup>

#### Nature of the Trustee's Powers.

The following points may be noted with regard to the powers, of the trustees in general :

- (i) In order that the trustees may be able to perform their functions or discharge their duties properly and effectively it is necessary that they must be invested with certain powers ;
- (ii) What powers may be properly exercised by the trustees depends upon the nature of the trust and sometimes upon the character and situation of the beneficiary. The trustee has generally wider powers in case of special trusts as contrasted with those which are simple. Similarly the powers of a trustee would generally vary according as the beneficiaries are *sui juris* or subject to some legal disability. Where the beneficiary is *sui juris*, the trustee has, in the absence of anything to the contrary in the trust-deed, no power to change the nature of the property *i. e.* convert land into money, or money into land. But where the beneficiary is not *sui juris*, it is frequently necessary in his interest that the trustee should have the power to convert the nature of the trust property and, subject to the interest of the beneficiary and such other conditions as may have been imposed, the trustee has the requisite power.
- (iii) Where the power vested in the trustees is absolute, the Court will not compel him to exercise it but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably.
- (iv) Where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular manner in which it is exercised provided it is exercised in good faith. Thus, for instance, where a testator devises real estates to trustees, in trust to manage them during the minority of an infant with power to lease in their discretion, the trustees will not be allowed to decline to exercise the power of letting. But the Court, while ordering the trustees to exercise this power, will not interfere *c. g.* as to the person to whom or terms on which it should be leased if reasonable and *bona fide*. Reference on the point may be made to Section 49 of the Indian Trust Act which authorises the Court to control the discretionary power of the trustee in case it is not exercised reasonably and in good faith.
- (v) The power of a trustee exists and must be exercised only for the benefit of the beneficiaries and must be reasonable, *bona fide* and impartial.
- (vi) The powers of a trustee are generally classified under three heads, *viz.*, (a) those given to him by the instrument of trust ; (b) those

vested in him by the statute ; (c) those available to him under the general principles of law and equity which are called general powers of equitable powers. The general powers are available and must be exercised subject to such limitations or restrictions as may be imposed by the instrument of trust or the provisions of statutory powers. Most of the trustee's powers are now contained in the Indian Trust Act, 1882 and (in England) in the Trustee Act, 1925.

### General Powers of Trustees<sup>14</sup>

Subject to the provisions of the trust instrument and the law, a trustee has the power to do all acts which he may consider reasonable and proper for the due execution of the trust and for the protection and support of a beneficiary who is not *sui juris* and incapable of taking care of himself.

The desirability or necessity of vesting or recognizing such a power in the trustee may be explained through the following words of a very distinguished writer<sup>15</sup> on the subject :

‘ Under particular circumstances the trustee is held capable of exercising the discretionary powers of the *bona fide* proprietor, for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate decision, while the sanction of the parties who are beneficially interested could not be procured without great inconvenience (as where the *cestui que trustent* are a numerous class) or perhaps could not be obtained at all (as where the *cestui que trustent* are under a disability, or not yet in existence), the alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion and perhaps in the meantime the opportunity might be lost. It is, therefore, evidently in furtherance of *cestui que trust*'s own interest, that where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power.’

Thus where the trustee has been entrusted with the management of the estate, he has the necessary power to repair it or even in exceptional and urgent circumstances to demolish it or otherwise make improvements therein. In *Re Bellinger, Durrell v. Bellinger*,<sup>16</sup> it was held by Kekewich, J., that a power to make outlays in repairs or improvements, *etc.*, out of income or *capital*, impliedly authorised the trustees to mortgage the property for the purpose of raising the necessary money out of capital. But the trustees have no power to do acts, however beneficial they may possibly be to the property, if they are in their nature unreasonable or problematical. For instance, they cannot make merely ornamental improvements or take down a mansion house for the purpose of rebuilding a better one or to build a villa for the mere improvement of the estate. Similarly, the trustees have the powers to cut down timber which has arrived at maturity and which would only degenerate if allowed to stand or where it is necessary to cut it for the purpose of thinning it. Similarly, they can make payments which, though not authorised by the trust instrument, are proper and necessary in the execution of the trust. Another case illustrative of the implied powers of a trustee is *Ward v. Ward*.<sup>17</sup> There the trustee, the immediate realization, as he was required to do, of the trust property, would have ruined one beneficiary from whom a large debt was due to the trust estate and would have seriously prejudiced others. Instead of doing so, the trustee

14. Section 36, Indian Trust Act, 1882.

15. Lewin on Trusts, 12th, ed., pp 709-710

16. [1898] 2Ch. 534.

17 2 H. L. Cas. 784.

made an arrangement with the debtor for payment of money by instalments ; and it was held that he was justified in taking that course because he had exercised a sound discretion.

It may here be pointed out that Section 36 of the Indian Trust Act, 1882, while giving statutory recognition to the general powers of a trustee and referring therein the power to lease trust property, imposes a limitation that the trustee cannot, except with the permission of the Court, lease the trust property for a term exceeding twenty-one years.

### **Statutory Powers of Trustees**

The statutory powers of trustees may be considered under the following heads :

**1. Power in relation to the conduct of Sale.**<sup>18</sup>—Where the trustee is empowered to sell trust property he may sell it at such time and in such manner as he deems fit consistently with the benefit of the trust. In particular, he may sell the trust property subject to prior charges or not and either together or in lots, by public auction or private contract and either at one time or at several times, unless the instrument of trust otherwise directs.

In selling or contracting to sell trust property, the trustee has the power to introduce or accept such conditions as he deems fit and reasonable. He has the power to buy in the property or part thereof at any sale by auction or to rescind a contract of sale and has, in either case, the power to sell the property again.

When the trust property has been sold either by auction or private contract, the trustees shall, for the purpose of completing the sale, have full power to convey or otherwise complete the transfer as may be necessary.

**2. Power to vary Investments.**<sup>19</sup>—A trustee may, at his discretion, call in any trust property invested in any security and invest the same on any of the securities authorised under Section 20 of the Indian Trust Act<sup>20</sup> and from time to time vary any such investments for others of the same nature :

Provided that where there is a person competent to contract and entitled at the time to receive the income of the trust property for his life or for any greater estate, no such change of investment shall be made without his consent in writing.

**3. Power with regard to the Maintenance of an Infant Beneficiary**<sup>21</sup>—In case of an infant beneficiary who is not being able to look after himself, it is necessary to give special powers to the trustees which are not necessary in the case of adult beneficiaries. It is, in such cases, the duty of the trustee to provide for the maintenance or education or advancement in life and to meet all reasonable expenses of his religious worship, marriage or funeral.

Accordingly, where any property is held by a trustee in trust for a minor beneficiary, the trustee has the power to pay to the guardian of the minor or otherwise meet the above expenses from the whole or part of the income to which the minor is entitled under the trust. If the income of the property is insufficient the trustee may, with the permission of the Court, but not otherwise,<sup>22</sup> meet those expenses from the corpus of the trust property.

The trustee is bound to invest the residue of the minor's income on com-

18. Sections 37, 38 and 39 of the Indian Trust Act, 1882.

19. Section 40, Indian Trust Act, 1882.

20. See p. 294 Supra.

21. Section 41, Indian Trust Act, 1882.

22. See Section 40 of the Indian Trust Act, 1882

pound interest in any of the authorized securities and for the purposes of meeting the aforesaid expenses of the minor, such accumulation would be treated as the income of the current year.

**4. Power to give Receipts for Trust Property<sup>23</sup>**—A trustee has the power to give a receipt in writing for any money, securities or other movable property, owing to him as trustee and in the absence of fraud, such receipt shall be a sufficient discharge to the person who owed them without his being under any duty of seeing to its application or liability for any loss or misapplication thereof.

**5. Power to compromise Claims**—The trustees have wide powers to compound or settle debts and disputes relating to the trust property. In England, the power is conferred by Section 15 of the Trustee Act, 1925, re-enacting Section 21 of the Trustee Act, 1893. In India, the power is conferred by Section 43 of the Indian Trust Act, 1882. The two provisions of law are almost identical. If, and in so far as, no contrary intention is expressed in the trust instrument, the trustees have the power :—

- (i) to accept any composition<sup>24</sup> or security for any debt or property claimed ;
- (ii) to allow any time for payment of a debt ; and
- (iii) to compromise, compound,<sup>25</sup> abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust.

The trustees have further the power to execute such instruments or do such things as may be necessary and expedient to give effect to any of the above-mentioned acts or arrangements.

The trustees may not be responsible for any loss occasioned by any act or thing done in good faith in the due exercise of these powers. It is, however, necessary that the power must be exercised by all the trustees acting together or by a sole acting trustee provided he is, by the instrument creating the trust, authorised to execute the trusts and powers thereof.

#### **Vesting and Suspension of Powers<sup>26</sup>**

When a power is vested in several trustees and any one (or more) of them disclaims or dies, the power may be exercised by the continuing trustees unless from the terms of the trust instrument it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Upon the appointment of new trustees, all the powers, unless there is any thing to the contrary under the law or the trust instrument, become vested in and exercisable by the new trustees or in them together with the continuing trustees. It may be mentioned that there is no legal bar to a person, who is not *sui juris*, being appointed or becoming a trustee but he cannot exercise the power unless he becomes *sui juris*.

Where a judgment has been given for the execution of the trust by the Court, or (before judgment) an injunction has been granted, or a receiver appointed, the powers of the trustees become, to the extent of such decree or order, suspended and they can thereafter exercise only such powers as may be in conformity with the said order or as may be sanctioned by the Court.

23. Section 42, Indian Trust Act, 1882.

24. Any arrangement by which a part of the debt is accepted in satisfaction of the whole

25. To settle or adjust by a fresh agreement.

26. Sections 44 and 45, Indian Trust Act, 1882.

## CHAPTER XXVII

### THE DISABILITIES OF TRUSTEES

The Indian Trust Act, 1882 has devoted a separate Chapter<sup>1</sup> to the disabilities of trustees which, in the leading text-books on the subject, has been covered under other topics connected with the office or function of a trustee and particularly in the duties of a trustee. Disability obviously means incapacity to do any legal act and here, as observed earlier, it refers mainly to the negative duties of a trustee. The consideration of the topic under a distinct head would, no doubt, be convenient from many points of view and there is hardly anything that can be said against it. The Chapter runs through nine sections, *viz.*, Sections 46—54 and the subject may here be covered in reference to the provisions made by these sections and under the following heads :

**1. Trustee cannot renounce his Office.**<sup>2</sup>—A trustee who has accepted the trust cannot afterwards renounce it except : (i) with the permission of the Court ; or (ii) with the consent of the beneficiaries if competent to contract ; or (iii) by virtue of a special power in the instrument of trust. As observed earlier, no one is bound to accept the office of a trustee, but once a person accepts, either expressly or impliedly, the trust and assumes the character of a trustee he, *inter alia*, imposes upon himself the disability not to renounce this responsibility or office at his pleasure. This is presumably with a view to ensure a continuous, systematic and efficient execution of the trust, for otherwise it would not be improbable that the operation of a trust becomes suspended because all the trustees suddenly give up their office or it may be that though the operation of the trust is not suspended its efficiency suffers because the powers or duties meant to be exercised by a number of them collectively are left to only a few of them or to persons other than those intended. A trustee cannot, however, be compelled to accept the office for all his life nor, indeed, would it be desirable to force him to continue against his wishes.

The law, therefore, taking its stand in between these two conflicting principles confines this disability to the renunciation of the office *at pleasure* and enables the trustee to be relieved from his office in such circumstances and manner as may be authorised or prescribed by law. As stated above, it is, as it should be, that the power of relieving a trustee resides (i) in the Court whose duty is to promote the trust ; (ii) in the beneficiary whose interest is affected thereby and (iii) the settler whose scheme is a question. If the trustee, unless so relieved, fails or declines to discharge the functions associated with his office he would be liable not only for such loss, if any, which may be caused to the trust estate owing to his premature or unlawful retirement, but even with regard to those that may be caused during his absence from office and the mere fact that he was not then associated with the trust would be no excuse to him.

#### **2. Trustee cannot delegate his Office**<sup>3</sup> :

##### **The General Rule.**

A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger.

1. Chapter V.

2. Section 46, Indian Trust Act, 1882.

3. Section 47, Indian Trust Act, 1882.

The office of a trustee, by whomsoever appointed, is one of personal confidence. Both in the nomination of and the acceptance of office by a trustee there is always an implied confidence or condition that all the functions associated with that office are being entrusted to and would be performed by the trustee personally. A trustee, therefore, who takes upon himself the management of the trust has, as a general rule, no right to shift his duty on to other persons. If he does so, he will be liable for any loss caused to the trust estate or breach of trust committed by the person to whom the office or any duty associated with it has been entrusted; and it would be no defence to the trustee to say that he took all reasonable and proper care in employing or selecting that person. It need further be noted that it makes no difference in the situation whether the duty is delegated to a co-trustee or a stranger.

So, if the trustee entrusts the custody of trust fund or property to X and X misappropriates or damages or destroys the property, the trustee would be liable. Or if, in taking a mortgage of property from trust money, the trustee entrusts the valuation of the mortgaged property to the mortgagor's agent and relying and acting on that evaluation he advances a loan which is more than the value of the property and which is not fully recovered, the trustee would be liable. Similarly, if the trustee delegates his power to lease trust property to X and X leases it on rent which is inadequate or on terms which are unreasonable or to a person who is not desirable, the trustee would be liable for the resultant loss to the trust estate irrespective of any consideration as to X's *bona fides* or reasonable and proper care.

#### Grounds for relaxing the general rule.

It must, at the same time, be realized that it cannot be possible for a trustee nor, indeed, would it be just to compel him to do every thing connected with the trust himself. There may be a duty the performance of which requires professional knowledge and skill in which it should not only be permissible but necessary to delegate that duty to some one possessing the requisite qualification. Then there may be acts which are usually done by or must necessarily be entrusted to others. Would it not then be just and expedient and, at the same time, in conformity with the need and interest of both the trust and trustee, to make an exception, in such cases, to the general rule imposing on the trustee the disability of delegating his duties and powers?

In *Speight v. Gaunt*,<sup>4</sup> which is a leading authority on the duties and liabilities of trustees, it was held by the House of Lords that though a trustee may not "delegate at his own will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers," yet "that when according to the regular and usual course of business, moneys receivable or payable ought to pass through the hands of mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys."

Similarly, in *Ex parte Belchier*<sup>5</sup> where it was sought to make the assignee of a bankrupt liable for the default of a broker, who had been employed to sell some of the bankrupt's property, Lord Hardwicke observed:

"If the assignee is chargeable in this case, no man in his senses would act as assignee under commissions of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. Courts of Law and of Equity

4. (1883) 9 App. Cas 1 : 4, 5, per the Earl of Selborne.

5 (1754), Amb 218.

- too, are more strict as to executors and administrators<sup>6</sup>; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.

“There are two sorts of necessities: *first*, legal necessity; *secondly*, moral necessity. As to the first, a distinction prevails where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable because his joining in the discharge was necessary. Moral necessity is from the usage of mankind. If a trustee acts as prudently for the trust as for himself and according to the usage of business, he will not be liable. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable.”

It is on such considerations that a number of exceptions to the general rule of law against delegation by a trustee, have arisen and are recognized both in England<sup>8</sup> and India<sup>9</sup> wherein the trustees are justified and have been authorised to discharge their duties and powers through others by delegation.

#### Exceptions to the General Rule.

The exceptional circumstances in which a trustee may lawfully and, of course, without liability, delegate his office or any of his duties may be placed and considered under the following four heads:

(i) *Where delegation is authorised by the instrument of trust.*—If and when delegation has been authorised by the author of the trust himself there is no place for the kind of presumption on which the disability in question is based or such presumption is, in that case or to that extent, rebutted and there is no breach of trust by such delegation and, therefore, no liability for the consequential loss, if any, to the trust estate. Thus, a testator by his will recommended his executors to employ A (who had been in the testator's own employment) as clerk or agent. The executors gave A, a power of attorney to receive debts, and A subsequently became insolvent. It was held<sup>10</sup> that if a testator pointed out an agent to be employed by the executor and such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money.

(ii) *Where the beneficiary, being competent to contract consent, to the delegation.*—It is based almost on the same principle as the above with this difference that in the above there is no breach of trust involved in the delegation while in the latter there is *prima facie* a breach of trust but the consent of the beneficiary or beneficiaries, if *sui juris* [either sole beneficiary or if more than one all of them consenting to it] protects the trustee from any liability to which he might otherwise be subject. So, if the trust property is to be leased or trust money be invested on mortgage of land and these works are, with the consent of the beneficiaries, entrusted to X, the trustees will not be liable for any default made by X or loss caused by his appointment.

6. Who are entitled to and receive remuneration for their services.

7. This is an example not of the legal disability of the trustee against delegation but of non-liability of one for the default of the other. For the sake of continuity and clarity of thought and expression, it has also been included.

8. See Trustee Act, 1925, Section 23.

9. Indian Trust Act, 1882, Section 47.

10. *Kilbee v. Sneyd*, 2 Moll 199.

The above cases are simple and clear and there is little difficulty, in those cases, in applying the law and determining the liability or otherwise of the trustee. It is, however, not so in the remaining two cases. In these cases, the competency of the trustees to delegate, though directly authorised by the statute, must ultimately be traced as flowing from an implied term in the appointment itself of trustees.

(iii) *Where the delegation is in the regular course of business.*—The case which perhaps best<sup>11</sup> illustrates the rule as to the delegation being in the usual course of business is *Re De Pothonier, Dent v. De Pothonier*.<sup>12</sup> There the trustees held as part of the trust investments certain bearer securities with coupons attached for the payment of the annual interest due on the securities. These were deposited with a banker with authority given him to remove from time to time the coupons, and claim the interest on behalf of the trustees as it became due. This was held a proper delegation of the duties, since it was the conduct which would be followed by any reasonably prudent man looking after his own affairs. Similarly, the trustee may, on the ground of conformity to universal usage, remit money through the medium of a respectable bank, as being the most convenient and the safest mode.

(iv) *Where delegation is necessary.*—As an example of what may be considered a necessary or practically unavoidable<sup>13</sup> delegation, may be mentioned from the case of *Field v. Field*.<sup>14</sup> There the trustees held a building estate which was being let off from time to time in plots. In order to save the constant reference to the trustees to produce title deeds to prove title, the trustees left those with the solicitors for the trust estate. It was held that under these circumstances the delegation was perfectly reasonable and proper and free from liability.

It must, however, be pointed out that it is difficult to maintain a clear division or distinction between delegation in regular course of business and that on account of necessity and most of the cases on the point may easily be placed under either or both these classes; since there may be an act which the trustee is able or competent to do but the doing of the act through another, though not expected of or possible for the trustee to do, is nonetheless in the regular course of business. So where there are numerous small debts or rents to be collected and the trustee employ X to collect these and the collected sum is lost by the insolvency of X, the trustees will not be liable; but whether on account of the employment being one of necessity or of its being in regular course of business, it is difficult to say. In the same way the trustees are entitled to employ solicitors, valuers, brokers, auctioneers, stewards, bailiffs, workmen and other experienced or skilled persons to do acts which they themselves are not competent or able to do.

#### **Requisites of a Proper Delegation.**

The following points need specially be noted with regard to the trustee's power of disability to delegate his office or duty :

- (i) In order to render the delegation legal and without any liability, it is necessary not merely that the circumstances should be such as to justify the trustee in delegating his duties, but also that the delega-

11. Strahan's Digest of Equity, 3rd ed., p. 134.

12. [1900] 2 Ch. 529.

13. Strahan's Digest of Equity, 3rd ed., p. 134.

14. [1894] 1 Ch. 425.



- tion should be to a proper agent. And further, in order that the exercise of the power of delegation, where available, may be deemed to be proper, it is necessary that :
  - (a) The person employed must be suitably qualified to do the kind of work entrusted to him. So if a trustee employs, say a stock broker to do what is properly a banker's business, he is guilty of negligence in exercising his power to delegate, and would, accordingly, be liable for breach of trust.
  - (b) The person employed must, apart from professional qualification, be fit and proper considering his general conduct and reputation the nature and amount of work entrusted and the remuneration settled *etc.* and if the trustee is negligent in selecting a person who could not be reasonably employed the trustee would be liable.
  - (c) The trustee must judge for himself the suitability of a particular person for employment in the circumstances of each case and cannot delegate the duty of choosing the agent to any one else. As observed by Kekewich, J., "The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is his conclusion—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs."<sup>15</sup>
  - (ii) The delegation must be limited in its nature, scope and duration to that which may be reasonable and proper under the circumstances. The trustee will not be immune from liability if it is different, wider or longer than was required. So a trustee who leaves the trust money in his agent's hands for an unnecessarily long period would be liable if it is lost on account of his default to recover it within reasonable time.

3. **Co-trustees cannot act singly.**<sup>16</sup>—Where there are more trustees than one, all must join in the execution of the trust, except where there is anything in the trust instrument or any law for the time being in force which provides otherwise.

It need be noted that the only exception, wherein all the co-trustees may not join in the execution of trust, mentioned in the Indian Trust Act, 1882 is where the trust instrument makes a provision to that effect. There are, however, cases<sup>17</sup> wherein the co-trustee is so permitted but presumably on account of their being covered by the other provisions in the Act, those cases have not been expressly included as exceptions in this section.

This disability is only a corollary of that considered under the preceding head. If a trustee cannot delegate his duties to another including a co-trustee, it follows that where the trustees are more than one, all being under the same disability of leaving it to any one, or more of them, must join in performing the duties under the trust. The underlying principle of the disability under consideration is that the settlor has entrusted the office to all the trustees alike and, therefore, every one of them must exercise his individual judgment and discretion on every matter and cannot leave it to be done by his co-trustees alone.

15. *Re Weal*, (1889) 42 Ch. D. 678.

16. Section 48, Indian Trust Act, 1882.

17. e. g. delegations permissible under the preceding head or Section 26 of the Act as to receipt of income.

The general rule on the point, as laid down in *Luke v. South Kensington Hotel*<sup>18</sup> is that the act of a majority of private trustees can bind neither a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all. A lease of trust property, therefore, by a majority of the co-trustees without the concurrence of the minority is invalid and may be challenged by the latter.<sup>19</sup>

In *Abdul Rahman v. Angur Rala*,<sup>19a</sup> where the plaintiff filed a suit for declaration of the tenancy basing her right on the tenancy granted by the managing trustee of the trust, the court held that the tenancy created by the managing trustee, acting singly, without the concurrence of the other trustees, was not valid tenancy since the managing trustee had no power or authority to create such a lease.

It is, therefore, necessary that all the trust property must be reduced into the joint names and control of all the trustees and it would be a breach of trust for the trustees to leave one or more of them in the sole control of it. Similarly, all investments of trust moneys should be made in the joint names of all the trustees. In the same way trustees in whose names trust moneys are banked, should not authorise the bankers to pay cheques signed by one only of their number; for that would be equivalent to giving control of the trust funds to one trustee alone; whereas the beneficiaries are entitled to the safeguard of the trustee's joint control.

On the same principle, it is necessary that all the trustees must join in the receipt of money in order that it may be an effective discharge to third persons. So, in *Lee v. Sankey*<sup>20</sup> a firm of solicitors being employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a railway company, paid over the money, without the receipt or authority of the other, to one of the trustees who became insolvent and died. It was held that the receipt of one trustee only could not be a sufficient discharge to the solicitors and that they were personally liable to make good the loss which resulted to the trust from such improper payment.

The rule is, of course, subject to exceptions, referred to above which may be illustrated through an example or two. So, if the instrument of trust authorises a trustee or some only of them to transact any business there can be no objection to it. The rule is also subject to exceptions on the score of necessity or convenience and accordingly title deeds or non-negotiable securities may safely be left in the custody of one of their number. Similarly, where shares are specifically bequeathed to trustees upon certain trusts and it is found that by the regulation of the company the shares can only be registered in the name of one trustee, the general rule cannot apply.

Adverse possession against one person to the office of trusteeship would not operate against another if the other person does not claim through the person whose right is lost by limitation. If the succeeding trustee claims title independently of the person whose right is lost by limitation, the principle that (once adverse possession starts, it operates not merely against the then trustee, but against his successors as well on the footing that such succeeding trustee claims under his predecessor) is not applicable.<sup>21a</sup>

#### 4. Trustees cannot exercise their discretionary powers arbitrarily.<sup>21</sup>—

18. (1879) 11 Ch. D. 121.

19. *Kunhan v. Narayan*, 20 M. L. J.

19a. A. I. R. 1974 Cal 16.

20. (1872) L. R. 15 Eq. 204.

20a. *Kuppu Ram Lingam Chettiar v. Rangnathan Chettiar*, (1973) 1 M. L. J. 288.

21. Section 49, Indian Trust Act, 1882.

As considered already<sup>22</sup> a discretionary power vests in the trustees for benefit of the beneficiaries and must be exercised reasonably and *bona fide* for the same purpose. A testator gave his trustees a discretionary power to sell certain property, and a discretionary power to purchase other property with the proceeds. The property was sold. One of the trustees then proposed that certain other property should be purchased. The other trustee refused to agree to the purchase. The court held that it would not interfere with a trustee's *bona fide* exercise of his discretions. The court would therefore not intervene to compel the dissenting trustee to agree to the purchase.<sup>22a</sup> Such a power is subject to the control of the Court and the Court will interfere with its exercise wherever it is not reasonable and in good faith. Courts will accordingly interfere<sup>23</sup> where the discretion is mischievously and ruinously exercised as by leaving the trust-fund outstanding on hazardous securities; or where it is corruptly exercised, or is not exercised in good faith, or where the trustees misbehave or decline to exercise the discretion.

(5-8). **Trustee cannot place himself in a position where his interest is in Conflict with his duty.**—Before continuing further with the disabilities of trustees it would be useful to point out that the disabilities considered hereafter are all only different applications of a general and much wider doctrine that no one must place himself in such a position that his interest may conflict with his duty and in case he does so, that which he ought to have done in discharge of his duties will prevail over, or be presumed to have been done in place of, what he may have done in his interest. This is a rule of public policy and is not limited to trusts but applies to all fiduciary relationships.

Lord Herschell in *Bray v. Ford*,<sup>24</sup> said, "It is an inflexible rule of a court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict... The rule is based on the consideration that, human nature being what it is, there is danger in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

The same doctrine was laid down by Field, J., in an important American case where he said, "It is among the rudiments of law that the same person cannot act for himself and at the same time with respect, to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and constituted as humanity is, in the majority of cases, duty would be overborne in the struggle."<sup>25</sup>

**5. Trustees cannot charge for Services.**<sup>26</sup>—A trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust except—

- (i) where the trust instrument expressly directs or permits him to receive such remuneration; or

22. See p. 310.

22a. *Tempest v. Lord Cannoys*, (1882) 21 Ch. D. 571.

23. See for authorities, the *Law of Trusts in British India* by W. F. Agnew, 2nd ed., p. 258.

24. [1896] A. C. 44.

25. *Wardell v. Railroad Co.*, (1880). 103 U. S. 651, 658.

26. Section 50, Indian Trust Act, 1882.

- (ii) where he has, before accepting the trust, contracted for the same with the beneficiaries who are *sui juris* ; or
- (iii) where the trust is before the Court, and he has, before accepting the trust, expressly stipulated for remuneration.

The disability does not attach to any Official Trustee, Administrator General, Public Curator or a person holding a certificate of administration.

The leading case illustrating the principle on which this rule is based is that of *Robinson Pett*,<sup>27</sup> where Lord Talbot enunciated the doctrine in the following words :

“It is an established rule, that a trustee, executor or administrator shall have no allowance for his care and trouble ; the reason of which seems to be, for that, on these pretences, if allowed, the trust estate might be loaded and rendered of little value : besides, the great difficulty there might be in settling and adjusting the quantum of such allowance especially as one man’s time may be more valuable than that of another ; and there can be no hardship in this respect upon any trustee who may choose whether he will accept the trust or not.”

“The true ground, however,” says Lewin,<sup>28</sup> “is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty, and as a matter of prudence, the court would not allow a trustee or executor to place himself in such a false position.”

Thus in *Barrett v. Harby*,<sup>29</sup> where a trustee had carried on a business for six years, in consequence whereof great advantage had accrued to his beneficiaries, it was held that he had no right to exact or charge any remuneration or bonus in respect of such services ; for his exertions were incident to the performance of the duties imposed by the deed of trust which he had accepted.

The general rule against any remuneration to trustees is subject to three classes of *exceptions* enumerated above.

If the author of the trust has directed through the instrument of trust that a certain salary or other payments should be made to the trustee in lieu of his services to the trust ; and if the precise amount is not fixed, an enquiry will be directed to ascertain what will be a proper remuneration. Where a trustee is appointed by the Court and no remuneration is otherwise provided or stipulated for, the trustee may, before accepting the office, pray for and be given such remuneration as may be deemed reasonable according to the nature of the trust and the degree of attention or time required for its execution. In the absence of or besides any remuneration that may be fixed by the trust instrument or through the Court, the trustees may contract with the beneficiaries for an allowance for his services towards the execution of the trust. In such cases it must be clearly shown that the beneficiaries were not only competent to contract but that they assented to such remuneration freely and without under influence or pressure.

In *Ayliffe v. Murray*<sup>30</sup> Lord Hardwicke said, “whether upon general grounds a trustee may make an agreement with his *cestui que* trust for extraordinary allowance, over and above what he is allowed by the terms of the

27. (1734) 3 P. Wms 132.

28. Lewin on Trusts, 12th ed., 780.

29. (1816) L. R. 2 Eq. 789.

30. 2 Atk. 58.

trust, "I think there may be cases where this Court would establish such agreement, but at the same time would be extremely cautious and wary in doing it. In general this Court looks upon trusts as honorary, any a burthen upon the honour and conscience of the person entrusted, and not undertaken upon mercenary views; and there is a strong reason too against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que* trust, and, therefore, this Court has always held a strict hand upon the trustees in this particular. If a trustee comes in a fair and open manner, and tells the *cestui que* trust that he will not act in such a troublesome and burthensome office, unless the *cestui que* trust will give him a further compensation, over and above the terms of the trust, and it is contracted for between them, I will not say that this Court will set it aside, there is no instance where they have confirmed such a bargain."

These observations have been made in relation to a case where the contract with the beneficiaries provides for additional remuneration but the conditions are, it is submitted, no less strict even where there is no other provision for remuneration to the trustees.

6. **Trustees cannot use Trust Property for their own Profit.**<sup>31</sup>—A trustee must not use or deal with trust property for his own profit or for any other purpose connected with the trust.

This rule was established in order to keep trustees in the line of their duty. It means that the trustee can gain no benefit to himself through any act done by him as trustee but that all his acts shall be for the benefit of his *cestui que* trust. So, if a trustee uses the fund committed to his care in buying and selling land or in stock speculations or lays out the trust money in a commercial adventure of his own, or employs it in his business, he will be liable for all the losses and the beneficiary will be entitled to all the gains. Thus where trust moneys were lent on mortgage, and the mortgagor, being a person of eccentric character, devised the equity of redemption to "the mortgagee", it was held<sup>32</sup> that, although the mortgagor did not know that the mortgagee was a trustee, yet as the devise was made to him as mortgagee, and as it was the trust which caused him to occupy that position, the devise of the equity of redemption belonged to the trust, and not to the trustee beneficially.

An important and somewhat difficult question arises in case of security deposits for due performance of a contract. The Courts in such cases are often faced with the task of deciding whether the deposit is simply in the nature of a debt or amounts his trust. The matter assumes special importance in the case of deposits in a company which goes into liquidation. If the deposit is impressed with trust, the depositor is entitled to get back the whole of deposit as stimulated for. If, on the other hand, it amounts to a debt the depositor is merely a creditor and has to share the assets with other creditors.

In *Selk Jena Ramfateh Chand v. Om Narain*,<sup>32a</sup> after reviewing Indian, English and American cases on the point and noting that the conflict of judicial authorities in India was more apparent than real laid down the criteria for adjudging the character of money in such cases. The question has to be decided on the basis of the terms of the agreement and the facts and circumstances of each case, without any leaving one way or the other on the fact that the money was given as a security to deposit. If a trust can clearly be spelled out from the terms of agreement that ends the matter. But if the trust cannot be spelled out clearly, the fact that there was no segregation provided for and

31. Section 51, Indian Trust Act, 1882.

32. *Chandler v. Bradley*, [1897] 1 Ch. 315.

32a. A. I. R. 1967 S. C. 1162.

the fact that the interest was to be paid would go a long way to show that the deposit was not impressed with the character of a trust.

The disability attaches to a Municipal Body which cannot after accepting a trust in favour of a section of the general public divert that property for its own use or general purposes.<sup>32b</sup>

7. **Trustee for sale of trust property cannot purchase.**<sup>33</sup>—The subject may be divided and considered under two heads :

(A) Where the trustee purchases or attempts to purchase directly from himself ;

(B) Where the purchase is effected by a contract or agreement between the trustee and his *cestui que* trust.

The general rule with regard to the former is that a trustee is absolutely incapacitated, while he remains a trustee, from purchasing or taking on lease or mortgage the trust property either from himself or from himself and his co-trustee, howsoever fair the transaction may be.

The general rule with regard to the latter is that a trustee may purchase or take on lease or mortgage the trust property direct from the beneficiaries provided the transaction is clearly fair.

(A) The leading case on the point is *Fox v. Mackreth*.<sup>34</sup> There Mackreth, who was a trustee for the sale of the estate for the payment of debts agreed to purchase the estates himself for a certain price. Before the contract was completed by actual sale Mackreth sold them to a third person at much higher price. In a suit by Fox, the beneficiary under the trust, to recover the profit made by the second sale it was held that Mackreth was a constructive trustee for the profit and the suit was accordingly decreed.

The reason why a trustee is not permitted to purchase is that the Court, as a rule, cannot allow a man to have an interest adverse and inconsistent with the duty which he owes to another. As purchaser the trustee is interested in getting the property at the lowest price he can, but as a trustee for sale, it is his duty to sell the property at the highest price he can obtain ; and taking a general view of things a man is likely to subordinate the latter to the former.

The following points need be noted with regard to the operation of this rule :

- (i) The transaction is not necessarily void but voidable at the option of the beneficiary. It is, however, important to mark that the beneficiary's right to have it set aside is *absolute* without any consideration or proof of fairness or loss to the beneficiary. Although the trustee may have given as much for the properties as it is reasonably worth, and as much as any one would give ; and although no fraud, mismanagement or negligence appears to the Court, yet the sale is always liable to be set aside at the suit of the beneficiary. The transaction is vitiated as a rule and by the relationship itself of the parties. The foundation of the disability was thus explained by Lord Eldon in *Ex parte Lacey*.<sup>35</sup>

“If the connection (between the Trustee and the *cestui que* trust) does not satisfactorily appear to have been dissolved, it is in the choice of

32b. *Taloda Municipality v. Charity Commr., Bombay*, A. I. R. 1968 S.C. 418.

33. Section 53, Indian Trust Act, 1882.

34. (1789) 2 Bro. C. C. 400 ; see also *Janakirama Ayyar v. Nilkamba Ayyar*, (1954) M. L. J. 486.

5. 6 Ves. 627.

the *cestui que trustent*, whether they will take back the property or not. It is founded upon this, that though you may see it in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court—by which I mean in the power of the parties in ninety-nine cases out of one hundred—whether he has made advantage or not. Suppose a trustee buys any estate, and by the knowledge acquired in that character discovers a valuable coal mine under it; and locking that up in his breast..... The probability is, that a trustee who has once conceived such a purchase will never disclose it; and the *cestui que trust* will be effectually defrauded.’

(ii) The disability or the nature and effect of the transaction remains unaffected :—

- (a) whether the trustee, being the sole trustee, purchases from himself or being one only of the several trustees, purchases from himself and his co-trustees,
  - (b) whether the trustee purchases the property directly or collusively through the intervention of a third party,
  - (c) whether the property is movable or immovable or whether the transfer is by way of sale, lease or mortgage,
  - (d) whether the purchase is made by the trustee through a private or by a public sale at auction; the reason in the latter being : ‘If persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present seeing the seller thereto bid for the estate or above its value, do not like to enter into that competition.’<sup>36</sup>
- (iii) A person who has been named as a trustee for sale, but who has never, either by words or conduct, accepted the office, is not a trustee or a person who has the power of becoming a trustee; and consequently he will not be disabled from purchasing the trust property. But once a trustee acts as such, the incapacity continues after he has ceased to be a trustee if, from the circumstances of the case, the Court is of the opinion that he ceased to be trustee with the view of qualifying himself for the purchase;
- (iv) Although the relief of the beneficiary in such cases is not subject to any time bar under the Limitation Act, it is, nonetheless, necessary for the beneficiary to seek his remedy within a reasonable time. If the beneficiary allows the trustee to remain in possession for a long time as an absolute owner, his right to relief may become barred by his acquiescence or laches. What period of time would operate as an absolute bar to relief can only be decided in reference to the facts of each case.
- (v) Under English law, the disability under consideration can be removed : (a) by virtue of an express power in that behalf contained in the trust instrument; or (b) by the consent of the Court. Section 52 of the Indian Trust Act, 1882 which deals with the disability under consideration does not mention either of these exceptions. In so far as the first *i. e.*, the power through the trust instrument is concerned it must be recognised to be so in India

36. Ex-parte Lacey, 6 Ves. 629, per Lord Eldon.

also on general principles. The second is doubtful. The power of the Court being expressly mentioned in Section 53 and not in this section, the intention of the Legislature presumably was to make the prohibition absolute.

(B) "The rule I take to be this," said Lord Eldon,<sup>37</sup> "not that a trustee cannot buy from his *cestui que* trust, but that he shall not buy from himself."

The prohibition in this case is not absolute and the trustee may take and retain trust property through purchase, lease or mortgage by virtue of an agreement with the beneficiary provided : "There is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que* trust intended, the trustee should buy ; and there is no fraud, no concealment, no advantage taken, by the trustee of information, acquired by him in the character of trustee."<sup>38</sup>

The burden lies always on the trustee to prove affirmatively and conclusively that he had been completely "at arm's length" with the beneficiary regarding the whole transaction in question and it is, indeed, difficult for the trustee to make out a case for retaining the property. As observed by Lord Eldon, ".....though permitted, it is a transaction of great delicacy, and which the Court will watch with the utmost diligence ; so much, that it is very hazardous for a trustee to engage in such a transaction."<sup>39</sup>

It may be noted that the provisions of Section 53<sup>40</sup> of the Indian Trust Act are not clearly worded and it is difficult to say whether it was enacted to cover the kind of transfer discussed under head (B) alone or is of a wider import. But taking into consideration the entire scheme of the Act and particularly the specific provision of Section 58<sup>41</sup> it appears that it is enacted to cover only the transfers falling under head (B). It must, however, be noted that no such transfer under this section can be made unless the sanction of the Court has been obtained and such sanctions may be given when the proposed transaction is manifestly for the advantage of the beneficiary.

**8. Trustees cannot lend Trust Fund to themselves or Co-trustees.**—"A trustee or co-trustee whose duty it is to invest trust money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees."<sup>42</sup>

This is also based on the same principle as, and strictly speaking, is covered by the disability under the preceding head.

37. Ex-parte Lacey, 6 Ves. 627.

38. Coles v. Trecothick, (1804) 9 Ves. 234, 237.

39. Ibid.

40. Viz, first part of this section ; the second lays down the rule of equity laid down in Keech v. Sandford which has been considered before under constructive trusts.

41. See p. 334.

42. Section 54, Indian Trust Act, 1882.



## CHAPTER XXVIII

### THE RIGHTS AND LIABILITIES OF BENEFICIARIES

The rights and liabilities of beneficiaries have together been laid down under Chapter VI, comprised of Sections 55 to 69, of the Indian Trust Act, 1882. Some of the rights and liabilities of the beneficiaries, it may be noted, have been covered by the earlier sections of the Act and have been already considered here in relation to the duties and liabilities of the trustees. The provisions of this chapter moreover include also what are more appropriately and commonly known as powers and remedies of beneficiaries. These defects are not, it may be noticed, peculiar to the Indian Trust Act but are associated with the subject itself and Dr. Hanbury before taking up the rights and remedies of beneficiaries aptly remarks "Equity being.....a string of loosely joined glosses on Common law, does not admit readily of scientific classifications. There is bound to be a great deal of overlapping."<sup>1</sup>

#### THE RIGHTS OF BENEFICIARIES

The rights of the beneficiaries may, in reference to the provisions of the Indian Trust Act, be considered under the following heads :

1. **Right to Rents and profits.**<sup>2</sup>—The beneficiaries have a right to the rents and profits of the trust property in such share or subject to such limitations as may have been provided for in the instrument of trust. The beneficiaries have in certain cases<sup>3</sup>, not merely the rights to rents and profits of the trust property but also to the corpus or the trust property itself *e. g.* if there is only one beneficiary and he is *sul juris*, he may compel the trustee to put him in possession of the trust property.

2. **Right to Specific Execution.**<sup>4</sup>—The beneficiary has the right to have the intention of the author of the trust specifically enforced to the extent of his particular interest.

It is the general rule that a trust can be executed at the instance of anyone who is entitled to a benefit under the trust. The right of the beneficiary to the enforcement of the trust is, however, limited to the amount of his interest in the trust and outside that sphere his position is generally no better than a stranger. The execution of the trust is *prima facie* to be carried out in accordance with the intention of the settlor as has been indicated in or may be inferred from the trust instrument. This rule is also subject to the limitation that under certain circumstances, as discussed in the following head, the trustees may be obliged to carry out not the intentions of the author of the trust but those of the beneficiaries collectively. But unless such a situation arises or has been created and unless they are otherwise directed by the Court, the trustees must adhere strictly and literally to the line of duty prescribed to them by the author of the trust.

3. **Right<sup>5</sup> to put an end to the Trust<sup>6</sup>.**—If there is only one beneficiary, or

1. Modern Equity by H. G. Hanbury, 4th ed., p. 325.

2. Section 55, Indian Trust Act, 1882.

3. See below under the third head.

4. Section 56, Indian Trust Act.

5. This is, strictly speaking, the power of the beneficiary. See Underhill on Trust And Trustees, 6th ed., p. 295.

6. Section 56, Indian Trust Act, 1882.

if there are several and they are all of one mind and not under any disability<sup>7</sup>, the execution of the trust in accordance with the terms of the trust instrument may be arrested, and the trust modified or extinguished.

So, if A bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for B. B may, if and when he is competent to contract, claim Rs. 10,000 itself.

Or, if A transfers certain property to B and directs him to invest it for the benefit of C. C may, if and when he is competent to contract, elect to take the property in its original character.

The underlying principle may be explained in the following words :

".....in equity (the beneficiary) is the sole and absolute owner, and the Court will not permit a person solely and absolutely entitled, to be subjected to the tutelage or interference of a trustee. The Court, in fact, regards a trustee as a kind of intermediary or stakeholder, whose office is to hold the scales evenly, and to see that the rights of several persons are mutually respected. But where there is only one person interested and that person is *sui juris* the trustee's *raison d'être* ceases to exist ; and consequently he himself becomes merely a person in the legal possession of another person's estate."<sup>8</sup>

The beneficiaries can put an end to the trust, but they have no power of appointing new trustees. W. B. were trustees of a will under which a testator settled his residuary estate on trust for his widow for life and after her death for his children. W, wished to retire as trustee. The widow and the children desired that a bank should be appointed trustee. B was unwilling to join with W. in exercising the statutory power vested in himself and W. in order to appoint the bank trustee, as he considered that the bank's fees would impose an unnecessary charge on the trust property. W, the widow and the children took out a summons, asking that B. should be directed to concur in appointing the bank trustee. The court, dismissing the summons, that beneficiaries who are together absolutely entitled to trust property are not entitled to control the exercise by their trustees of the power of appointing new trustees.

Such beneficiaries must either put an end to the trust ; or, if the trust is continued, the trustee must be those appointed according to the original instrument or under the Act, and not persons selected by the beneficiaries.<sup>9a</sup>

The legal position of the sole beneficiary is the same as that of any number of them provided they are all of one mind and, of course, each or one of them is competent to contract. So, if A transfers certain properties to T in trust for sale directing the proceeds to be distributed among X, Y and Z equally or in the ratio of 1 : 2 : 3 : and X, Y and Z all being competent to contract elect to retain the property as such, the trust would come to an end and the property would continue in its original form according to directions of X, Y and Z. Similarly, if the trust be for A for life with remainder for his wife B for life for her separate use with remainder to X, Y and Z absolutely, then A, B, X, Y and Z, if not subject to any disability, can join together in putting an end to the trust and calling upon the trustees to deal with the property as they may direct.

In all such cases the beneficiary or beneficiaries may decide either to extinguish the trust altogether simply to modify it as, for instance, in the

7. Viz. infants, lunatics and married women, restrained from anticipation

8. See Underhill *ibid* p. 295.

8a. Brock Bank Ward v. Bales, (1948) 1 All E. R. 287.

above illustration X, Y and Z may decide to take in the inverse ratio of 3 : 2 : 1 or may simply arrest it as, for instance, in same illustration when they (X, Y and Z) decide that the property will not be sold for 5 years.

It is important to note that in all such cases it does not matter that the settlor intended that the trustee shall have the control of the property or that what the beneficiaries decide to do has been prohibited by the settlor provided the beneficiaries have the sole and absolute interest in the property.

So, where certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24, and then to transfer the gross amount to him. A, on attaining majority, may, as the person exclusively interested in the trust property, require the trustees to transfer it immediately to him.

In *Gosting v. Gosting*<sup>9</sup>, Vice-Chancellor Page Wood said, "The principle of this Court has always been to recognise the right of all persons who attain to age of twenty-one<sup>10</sup> to enter upon the absolute use and enjoyment of the property given to them by will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain the age of twenty-one".

The result would be the same if the restriction is as to the manner of enjoyment. So, where money is advanced, to the trustees to purchase a life annuity for X adding that the annuitant will not be entitled to have the value of his annuity in lieu thereof, X can still extinguish the trust and validly insist on having the money.

But where money is transferred to the trustees in trust for the purchase of land to be settled in trust for X and her issues, X not being the only person beneficially interested cannot demand the capital.

The law as stated above does not obviously apply to charitable trusts. In *re Levy*<sup>10a</sup> it was held that though in an indefinite bequest of income to an individual shows, as a matter of interpretation and in the absence of words indicating the contrary, an intention that the donee shall be entitled to call for the capital, since he will not live to have full enjoyment of the bequest otherwise, that principle does not apply to a bequest to a charity, as a charity continues in perpetuity and effect can validly be given to a perpetual trust income for its purpose.

#### 4. Right to inspect and take copies of trust instrument, accounts etc.—

"The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust property, the accounts of the trust property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty".<sup>11</sup>

As has been referred to already in the course of investigating the rights of the trustees, the trustee, in whom the legal estate is vested is entitled to the custody of the deeds; but the beneficiaries are entitled at all reasonable times to inspect them or to have a copy of such deeds. Similarly, the trustee has the right to take the advice, opinion or direction of the Court and the bene-

9. (1859) Johns 265.

10. The age of majority under English law: in India it being ordinarily 18 years.

10a. (1960) 1 All E. R. 42 (C. A.).

11. Section 57, Indian Trust Act, 1882.

ficiary has a right to know them. All this is to enable the beneficiary to have full and accurate information as to the amount and state of the trust property so that he may be able himself to safeguard his interests under the trust and to take proper steps to prevent or remedy breaches of trust.

It must, however, be noted that if the beneficiary requires a copy of an account or documents he must pay the necessary expense himself for it would not be fair that it should be saddled on the trust estate affecting the interest of other beneficiaries. On the same ground, where a beneficiary demands information as to his rights under the settlement which cannot be furnished by the trustee without the assistance of a solicitor, the trustee is not bound to incur that expense, unless the beneficiary is willing to pay the costs of complying with his requisition.

**5. Right to transfer Beneficial Interest.**—"The beneficiary, if competent<sup>12</sup> to contract, may transfer his interest but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest."<sup>13</sup>

The consideration of this right at an appropriate length is neither possible nor would be proper here. It involves questions relating to the general law regarding the transfer of property and the personal law of the beneficiary and it would be sufficient to say that the beneficiary is competent to transfer or alienate his beneficial interest in the same way and to the same extent as if or when there was no trust imposed on such interest; or in other words, as if it was not merely his beneficial interest under a trust but full ownership. The beneficiary may exercise this right of ownership without the intervention of the trustees who have no power of interference and where the beneficiary conveys his interest in the trust property, the transferee may recover the same from the trustee.

Where the beneficiary assigns his interest in the trust fund, the assignee should take care to give notice to the trustees of the assignment for the following reasons :

- (i) In order to prevent a subsequent assignee from gaining priority giving of notice<sup>14</sup> ; and
- (ii) In order to prevent the trustee from paying over the trust fund to the beneficiary or any one otherwise entitled to it.

Section 28 of the Indian Trust Act provides :

"When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered."

Reference need also be made to section 69 of the Indian Trust Act which provides that every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

**6. Right to sue for Execution of Trust.**—"When no trustees are appointed or all the trustees die, disclaim, or are discharged, or where, for any other reason, the execution of a trust by the trustee is or becomes impracticable, the

12. It may be noted that the section also mentions the disability of a married woman during coverture.

13. Section 58, Indian Trust Act, 1882.

14. See maxims on priority, pp. 54-56, *supra*.

beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or a new trustee."<sup>15</sup>

This provision simply fulfils the requirements of the equitable doctrine expressed through the well-known maxim, "Equity will not allow a trust to fail for want of a trustee." In the exercise of its jurisdiction over trusts, equity did not allow the intentions of the settlor or the interests of the beneficiaries to fail or suffer simply because there was no trustee to execute it either because the settlor had not been careful to appoint or make provision for one or because the settlor's appointment or scheme could not, for some reason or the other, be operative. In such situations the Court took upon itself the execution of the trust till a suitable appointment of trustees could be made for the purpose. The approach of equity towards these cases was expressed by Wilmot, C. J., as follows :

"The person who creates a trust means it should at all events be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the Constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office in the first instance. There is some personality in every choice of trustees ; but this personality is *res unus actatis*. If the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the Constitution has substituted in its place. A college has to be founded under the eyes of the five trustees that cannot be. The death of the trustees frustrates the medium. What then ? Must the end be lost because the means have, by the act of God, become impossible ? Suppose the question was asked the testator, 'If trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate ?' 'No : I trust them to execute my intention'.<sup>16</sup>

In executing the trust, the Court acts upon and carries out the intention of the author of the trust by substituting itself in the place of the trustee. The difficulty of carrying the trust into execution will not prevent the Court from taking up the responsibility. If the trust can by any possibility be executed by the Court, the non-execution by the trustee shall not prejudice the beneficiary. The Court may appoint a receiver who will act in accordance with the directions as he may receive from the Court, from time to time.

**7. Right to proper Trustees.**<sup>17</sup>—The beneficiary has a right to have the trust executed by proper persons and by a proper number of such persons. Accordingly, where a trustee is or becomes subject to any disability or disqualification or is unable to devote his time and attention to the trust or does not otherwise act reasonably and fairly, the beneficiary may institute a suit for the removal of such a trustee and for the appointment of a new trustee in his place. If the Court is satisfied that the continuance of a particular trustee would not be conducive to the proper administration of the trust, it may remove him even though there is no charge or proof of misconduct or personal disqualification. The doctrine has been carried so far by the Courts as to remove a joint trustee from a trust who, wished to continue in it without any direct or positive proof of his personal default upon the mere ground that the

15. Section 59, Indian Trust Act, 1882.

16. Attorney General v Lady Downing, Wilm, 21, 22.

17. Section 60, Indian Trust Act, 1882.

other co-trustees would not act with him. Lord Nottingham, in that case,<sup>18</sup> said : "I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it ;" and without any reflection on the trustee, declared that he should meddle no further in the trust.

Section 60 of the Indian Trusts Act, 1882, lays down that the following are not proper persons to be or continue as a trustee :

"A person domiciled abroad ; an alien enemy, a person having an interest inconsistent with that of the beneficiary, a person in insolvent circumstances ; and unless the personal law of the beneficiary allows otherwise, a married woman and a minor."

The list, it is submitted, is not exhaustive and the beneficiary's right to seek removal of a trustee under this section cannot be limited to such cases alone.

It is important to note further that the section adds that "when the administration of the trust involves, the receipt and custody of money, the number of trustees should be two at least." Accordingly, if the number of trustees falls below that necessary under the above provision or otherwise goes down to such a number that the trust cannot be administered, the beneficiaries may institute a suit to bring the trustees to the requisite number by making new appointments.

**8. Right to compel the Trustee to any act of Duty.**—"The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and refrained from committing any contemplated or probable breach of trust."<sup>19</sup>

Thus, if X commits trespass on a piece of land forming part of the trust property and the trustee does not sue him, he may be obliged to do so at the instance of the beneficiary. Similarly, if a tenant for life (who is a constructive trustee for the remainderman) refused to renew leaseholds, the Court will compel him to do so.

The beneficiary's right, it is particularly important to note, is not only limited to compelling a trustee, by means of a suit, to do any particular act of his duty, but extends to obtaining an injunction to restrain his trustee from any act which amounts to or may result in a breach of trust. So, where a trustee of certain land, with a power to sell the same and pay the proceeds to B and C equally, is about to make an improvident sale of the land, B or C may sue for an injunction to restrain A from making the sale. It may further be noted that Section 54 of the Specific Relief Act, 1877, also makes a similar provision for obtaining an injunction against the trustee.

#### REMEDIES OPEN TO BENEFICIARIES IN CASE OF A BREACH OF TRUST

In case a breach of trust has been committed, it is open to a beneficiary to adopt it and to have all the profit and benefit arising from it to the trust estate or may in the converse case condone the breach and bear the consequential loss to the trust. There is, in such cases, no question of any relief to the beneficiary. In case of a breach of trust which is not adopted or condoned by the beneficiary or in case there are more than one, all are not prepared or competent to adopt or condone it, the beneficiary has, unless he becomes otherwise disentitled to it, *e. g.*, by concurrence or limitation, his choice between the following two remedies :

18. *Uvedale v. Ettrick*, 2 Ch. Cas. 130.
19. Section 61, Indian Trusts Act, 1882.

1. Relief against the trustee personally ;
2. Relief against any one holding the trust property. This is better known as the beneficiary's "right to follow the trust property" which is the general rule subject to important limitations and conditions.

So let it be assumed that there is a trust of which T is the trustee and B is the beneficiary and one of the trust properties is X. T, *in breach of the trust*, sells X to M for Rs. 5,000/-. B has the right, unless he has by his own activity or inactivity lost or given it up, to sue T and recover from him the loss caused to the trust estate by his sale without bothering himself with regard to the whereabouts of X.

But the more important and, indeed, the more valuable, right which equity gives to the beneficiary is to follow—*forgetting for the moment the exceptions*—X from hand to hand and from one form to another in which it changes or has been converted and ultimately lay his hands on or recover it wherever or in whatever form it may then be. So if M transfers X to N and N to O and O to P and so on, B may run through successive hands and seize and recover it from P, *etc.* Similarly, with regard to the form, let it be supposed—without adverting to its impossibility or absurdity—that X was a piece of land and the next day it turns into a large tract of land and the third time there appears a villa on it which subsequently turns into a castle or mansion and then it is transformed into a big estate. B has a right to trace X in all these forms and recover X in shape of a big estate in which it happens to be at the moment. The limits within which or the condition or exceptions subject to which, it is permissible, however, remains to be considered.

**1. Relief against the Trustee Personally.**—The subject has, in relation to its different aspects, already been considered in the course of the investigation regarding trustee's liability in general. The following points may, however, be mentioned further in this connection :

- (i) If the trustee, being a partner, wrongfully employs trust property in the business or on account of partnership, no other partner is liable therefor in his personal capacity to the beneficiary, unless he had notice of the breach of trust. The partners having such notice are jointly and severally liable for the breach of trust.<sup>20</sup>
- (ii) If a trustee makes good a breach of trust out of his own property on the eve of his bankruptcy, the trust estate is generally entitled to retain the benefit and his trustee in bankruptcy cannot set the transaction aside as a fraudulent preference.<sup>21</sup>
- (iii) If the breach of trust consists in making an unauthorised investment, the trustee is entitled to realise it in order to replace the trust funds.

**2. Right to Follow the Trust Property.**—This may be split up and considered under the following heads :

**The general rule.**

The general rule,<sup>22</sup> as explained earlier, is that where trust property has been transferred to another inconsistently with the trust the beneficiary has a right to trace the trust property from one hand or form to another and ultimately recover it wherever or in whatever form of it happens to be. Before

20 Section 67, Indian Trusts Act, 1882.

21 See for authorities Snell's Principles of Equity, 23rd ed., p. 193.

22 Section 63, Indian Trusts Act, 1882.

taking up the exceptions to this rule wherein the beneficiary is left to his personal remedy, the following points need be noted :

- (a) The right of the beneficiary to follow the trust property is available to him as long as the trust property is identifiable or, as it is generally said, "it is earmarked". Formerly it was thought that "money has no earmark" and as such could not be followed. This idea is now exploded,<sup>23</sup> and the nature or form of the substituted property is not relevant to the beneficiary's right to follow the trust property except with regard to the difficulty which is involved in identifying the trust property in such a state. But wherever it can be distinguished as being part of the trust estate, money is as much within the rule as anything else.
- (b) In considering the beneficiary's right to follow the trust property it would be convenient to reserve for separate consideration those cases wherein the trustee has paid trust money into his own account and has mixed it with the same.

#### Exceptions to the general rule.

The beneficiary's right to follow the trust property in the hands of third persons is subject to the following exceptions :

- (i) The right cannot be exercised against a person who has acquired the legal estate in the trust property for value and without notice of the trust ; his title in the trust property being good against the beneficiary who has merely an equitable interest in the property. The leading case on the point is *Thorndike v. Hunt*.<sup>24</sup>
- (ii) The right cannot be exercised even against a transferee for consideration from the above, viz. *bona fide* purchaser for value without notice.

These exceptions have been considered at an appropriate length under the maxims<sup>25</sup> on priority and nothing can be usefully added to them except the following :

- (a) The second exception noted above does not apply when the trust property has come back in the hands of the trustee and Section 65 of the Indian Trusts Act, 1882, accordingly provides : "Where a trustee wrongfully sells or otherwise transfers trust property and afterwards becomes the owner of the trust property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of the intervening transferees in good faith for consideration."
- (b) A judgment-creditor of the trustee, attaching and purchasing trust property is not a transferee for consideration and, therefore, not entitled to the protection available to persons coming within the aforesaid exceptions.<sup>26</sup> He only acquires whatever interest the judgment-debtor had in the property and there being no saleable interest in the trust property in respect of the trustee's own debts, the legal estate in the trust property does not pass to him.

23. *Re Hallett's Estate*, (1880) 13 Ch. D. 696.

24. (1859) 3 De. G. & J. 563.

25. See pp 47-56 supra.

26. Section 64, Indian Trusts Act, 1882.



- (c) Section 64 of the Indian Trusts Act, 1882, expressly provides that the general rule regarding the beneficiary's right to follow trust property does not apply to money, currency notes, and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, e. g. for goods supplied or in payment of antecedent debt. It need be noted "that the basis for the exclusion of such cases is not the nature of the property but its having passed in circulation in the hands of a *bona fide* holder. The money *etc.* being put into circulation becomes in distinguishable and as such cannot be followed. It may be noted further that the common law adopted the custom of merchants and recognised that such instruments were transferable. Consequently, the transferee of a negotiable instrument has a legal title and equity being equal would be protected against an equitable title. If, however, the transferee has notice of prior equities, he will be postponed. It is, therefore, submitted that this exclusion is, strictly speaking, covered by the general rule together with the two exceptions.

*Thorndike v. Hunt*<sup>27</sup>.—In this case H (Hunt) was the trustee of two entirely different trusts, one in favour of T (Thorndike) and the other in favour of B (Brown). H applied to his own use money from the trust in favour of T. In a suit in respect of the breach of trust H transferred money in his hands into that of the Court and it was deposited to the credit of T's suit. By the operation of statute, legal estate in such money became vested in the Accountant-General for the purposes of the suit.

Subsequently, it was discovered that H in making the above deposit had provided himself by fraudulently misappropriating certain funds from the trust in favour of B. B, thereupon, brought a second suit for the purpose of recovering the money deposited in the Court to the credit of T's suit, and the question arose whether B could reach it.

It was held that B could not follow the trust fund because equities of T and B being equal, T had obtained the benefit of the legal title and as such his right to retain it was higher than B's equity to follow it.

**Beneficiary's right to follow where the trust fund has been blended by the trustee with his own.**

This may be split up under three heads :—

- (i) Where the trustee has converted such money into land : In such cases the beneficiary has no right to take the land but he is entitled to a first charge on the land for the trust money. So, where<sup>28</sup> a trustee wrongfully purchases land in his own name, partly with his own money and partly with money subject to a trust for B, B is entitled to a charge on the land for the amount of the trust money so misemployed.
- (ii) Where the trust fund though mixed with the trustee's own is still distinguishable : In this case the beneficiary has the right to follow the trust fund and recover it from the trustee's account.
- (iii) Where the trust fund has been blended with the trustee's own fund in such a way as to make its identification impossible. In such

27. (1859) 3 De. G. & J. 563.

28. Illustration (b) to Section 63 of the Indian Trusts Act, 1882.

cases the following rule is applicable. If the trustee takes out from this blended fund money for his own purposes, he must be assumed to have drawn on his own money; the beneficiary can, therefore, claim the balance of the mixed fund as being the trust property. If, however, the trustee does draw out trust money because there is not enough of his own and if any money was subsequently deposited in the fund, the beneficiary could not claim that as his own unless he shows that the subsequent deposit was intended to replace the trust money.<sup>29</sup> Where the trustee mixes with his own trust fund of two beneficiaries he is held to draw out first his own money and then that of the beneficiary whose money he paid first into the blended fund.

The leading case on the point is *Re Hallett's Estate*,<sup>30</sup> wherein the whole subject was elaborately discussed by Jessel, M. R. The following excerpts may be quoted to illustrate the reasonings behind the rules :—

“Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag and by mistake or otherwise dropped a sovereign of his own into the bag, could anybody, suppose that a Judge in equity would find any difficulty in saying that the *cestui que* trust has a right to take 1,000 sovereigns out of that bag?.....It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns .....(It would similarly make no difference) if instead of putting it into his bag, or after putting it into his bag he carries the bag to his banker.....

“Nothing can be better settled either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. When we come to apply that principle to the case of a trustee who has blended trust-moneys with his own, it seems to me perfectly clear that he cannot be heard to say that he took the trust money when he had the right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag and he adds to them another hundred sovereigns of his own, so that they cannot be distinguished and the next day he draws out for his own purposes £100,—is it tolerable for any one to allege that what he drew out was the first £100, the trust-money, and that he misappropriated it, and left his own £100 in the bag? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers.”

It was on this principle or on such considerations that it was held that the rule in *Clayton's case*<sup>31</sup>—under which it is assumed that where a customer

29 See Snell's Principles of Equity, 23rd ed., pp. 194-195.

30. (1880) 13 Ch. D. 696

31. (1816) 1 Mer. 572.

draws cheques upon his banker he intends, where there is no arrangement to the contrary, to draw out first the money he first paid in—cannot apply to a case of this kind.

**Conditions subject to which the right to follow may be exercised.**

As has been laid down under Section 62 of the Indian Trusts Act, 1882, the beneficiary must, in or for the purposes of recovering the trust property, repay the purchase-money paid by the trustee or his transferee with interest and such other expenses (if any) as he has properly incurred in the preservation of the trust property. This is in conformity with the equitable doctrine "He who seeks equity must do equity", and the beneficiary's right to follow the trust property being equitable he must, as a condition subsequent, do equity to the person from whom he recovers the property by paying him his reasonable costs and expenses. It is at the same time necessary that the trustee or purchaser must (a) account for the net profits of the property ; (b) be charged with an occupation rent, if he has been in actual possession of the property ; and (c) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser. The section, it may be noted further, preserves the rights of lessees of the trust property who have contracted the lease in good faith with the trustee or purchaser before the trustee seeks his remedy against them.

### LIABILITY OF THE BENEFICIARIES<sup>32</sup>

Where a trustee commits a breach of trust at the instigation or with the consent of one or some of the several beneficiaries under a trust, such beneficiary is liable for the loss caused thereby to the trust estate and the other beneficiaries are entitled to have all his beneficial interest under the trust impounded until the loss caused by the breach has been compensated.<sup>33</sup>

This question does not arise if there is only one beneficiary or where there are more than one, all are responsible for the breach of trust because this would be a good defence to the trustee in any claim for liability and there is as among the beneficiaries, none to suffer or complain. So where one or some only of the beneficiaries have acquiesced or concurred in the breach, other beneficiaries are entitled to be compensated. They may proceed against the trustee and compel him to make good the loss to the trust estate. The trustee has in such cases the right to be indemnified<sup>34</sup> out of the interest of the beneficiary who instigated the breach of trust to the extent to which the beneficiary benefited by the breach of trust, and the Court may, for this purpose, impound all or any part of the beneficiary's interest in the trust estate. In England such a provision of law has been in existence for a long time through the Trustee Acts and is now contained under Section 62 of the Trustee Act, 1925.<sup>34</sup>

The peculiarity of Section 68 of the Indian Trusts Act, 1882, is that it gives a right to the beneficiaries to have the beneficial interest to the defaulting beneficiary impounded for the loss caused thereby to the trust estate. This remedy, it is submitted, is alternative to the one available against the trustee himself. There are four circumstances under which this right is exercisable :

32. Section 68, Indian Trusts Act, 1882.

33. See Section 33 of the Indian Trusts Act, 1882.

34. Compare Section 33 of the Indian Trusts Act, 1882.

- (i) where the beneficiary in question joins in committing the breach of trust, or
- (ii) where he knowingly obtains any advantage therefrom without the consent of the other beneficiaries, or
- (iii) where he becomes aware of the breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of other beneficiaries, or
- (iv) where he has deceived the trustee and thereby induced him to commit a breach of trust.

The right may be exercised even against persons claiming under the beneficiary in question except, of course, those who are transferees for consideration without notice of the breach. The right is, however, not available against the beneficiary if she is a married woman restrained from anticipation.

## CHAPTER XXIX

### EXTINCTION OF TRUST

Having examined the subject of trust in its different aspects, viz., what is a trust, how it arises or may be created, how it functions or may be executed, what are the rights and liabilities of the different persons or classes of persons connected with or falling within a trust, it is natural to enquire as to how or under what circumstances may a trust be extinguished. The enquiry is, indeed, short and simple but it has, nonetheless, its own importance and bearing on the subject, although it does not generally appear to form part of a treatise on the subject. The Indian Trusts Act, 1882, however, devotes a separate Chapter to this topic and lays down the law on the point under Sections 77-79. The investigation of the subject may accordingly be concluded with the investigation of the extinction and revocation of trust.

#### Extinction of Trust.

"A trust is extinguished—

- "(a) When its purpose is completely fulfilled ; or
- "(b) When its purpose becomes unlawful ; or
- "(c) When the fulfilment of its purpose becomes impossible by the destruction of the trust property or otherwise ; or
- "(d) When the trust, being revocable, is expressly revoked."<sup>1</sup>

Extinction of trust assumes not only the prior existence but the operation of a trust and may be distinguished from those cases where the trust though sought to be created never takes effect because it lacks any one of those essentials, considered before, which are necessary for the creation of a trust. There is, except to the extent of extensions on the doctrine of *cy-pres etc.*, no distinction between a public and private trust in this sphere. Although the life of a public trust is usually longer than that of a private trust the mode or ground of extinction is the same in the two cases.

In a large number of cases the trust comes to an end when the purpose for which it had been created is completely fulfilled. So, where property was given to trustees in trust for the education and maintenance of X and to hand over the property to X on his attaining the age of majority, the trust would be extinguished when X becomes a major and the residue of the trust property is handed over to him. It may be that the trust instrument makes an ultimate provision for the disposal of the residue of the trust property after the object of the trust has been achieved and in that case the trust would be extinguished after the residue has been so disposed of. If, however, the trust instrument is, with regard to its provisions, confined to the purpose for which the trust has been created, it would, as an express trust, be extinguished after the fulfilment of that purpose but it would thereafter continue as an implied trust in favour of such persons who would be entitled to its residue and the purpose of the trust would be considered to have been completely fulfilled only when the residue of the trust property reaches its proper destination.

Under the Chapter on "Creation of Trust", it has been considered as to what are the purposes which are recognized as lawful and for which a trust

1. Section 77, Indian trusts Act, 1882.

may be created and what are those that are unlawful and for which no trust can be created. The section here essentially conceives and provides not for the initial but supervening unlawfulness. Such cases are, of course, not very frequent. So, where trust has been created for the promotion of a certain association which or the object of which is, after some time declared by an Act to be unlawful, the trust would be extinguished after the coming into force of such an Act. Similarly, where properties are transferred in trust for X and Y on their marrying each other and for their joint lives and, sometimes after the marriage, it is declared a nullity or is dissolved, the trust would be extinguished.

The impossibility in the fulfilment of the purpose would generally arise with regard either to the trust property or the beneficiary or the specific manner in which the beneficiary is intended to be benefited. So if properties are transferred in trust for the education of X in England and after some time X dies or gives up his education or becomes unfit for the same, the trust would become extinguished as being impossible of fulfilment. Similar consequences would follow where T transfers properties in trust for X and after some time Y claims and gets the property as an heir of T on the ground that T was not competent to transfer the properties in trust.

In *In re Whitworth Art Gallery Trusts Manchester Whitworth Institute v. Victoria University of Manchester*,<sup>1a</sup> the income of the institute having become insufficient to maintain its activities, the Court sanctioned the scheme for transfer of the trust to Victoria University as sole trustee with a condition which could serve partly the object of the institute and partly that of the university. "The proportion," it was observed "which seems to emerge...(from the authorities).....is that a charitable Corporation funded by a Royal Charter cannot be refunded or re-established by the Court, but can be regulated and controlled by the Court, especially on financial grounds, and in that case the Court is entitled to have regard to altered circumstances."<sup>1b</sup>

The fourth provision for the extinction of a trust refers us to another enquiry, viz. whether and when a trust may be revoked? Assuming for the present that a particular trust is one which may be revoked by the author of the trust, the trust would be extinguished when he expressly exercises that power and revokes the trust.

#### Revocation of Trust.

Revocation means the undoing of a thing granted or a destroying or making void of some deed that had existence until the act of revocation made it void. The relevant enquiry that has to be made in relation to trust, therefore, is when the trust has once been created or become operative, is it open to the settlor to revoke his grant and withdraw the property as a whole from the trust or vary the grant in respect of the beneficiaries either as to their class, number or terms or in other manner different from that laid down in the instrument of trust or expressed at the time of creating the trust. As has been stated earlier, once a trust has been created and becomes operative or capable of operation without any assistance of or interference from the author of the trust, he (the author of the trust) is divested of all interest in or dominion over the trust property and he has, as a general rule, no right to revoke the trust or the grant in any manner or to any extent. There are, however, certain exceptional cases or situations in which it may be revoked. Section 78 of the Indian Trust Act provides :

1a. (1958) 1 Ch. 461, 469, per Vaisey, 1.

1b. See also *In re Stead's Will Trusts*, (1959) 1 Ch 354 vis-à-vis Variation of Trusts Act, 1958.

"A trust created by will may be revoked at the pleasure of the testator.

"A trust otherwise created can be revoked only—

"(a) where all the beneficiaries are competent to contract—by their consent ;

"(b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust ; or

"(c) where the trust is for the payment of debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust."

In so far as a trust created by will is concerned it is revocable at the pleasure of the testator, the reason being that a will is ambulatory during the life time of the testator and takes effect only after his death. Like all wills, the testator is capable of revoking his will for trust as and when he likes. The will for trust if unrevoked takes effect after the death of the testator and no question of its revocation by him arises thereafter. Then with regard to a trust for the payment of debts, it has been already<sup>2</sup> stated that, unless communicated to the creditor, these are, strictly speaking, no trust at all. Being merely an arrangement for the convenience of the debtor, it may also be revoked at his pleasure.

So there are, in fact, only two cases wherein a trust created by a non-testamentary instrument may be revoked : (i) where the author of the trust has expressly reserved such a power and (ii) where all the beneficiaries being competent to contract, consent to the revocation. In the former there can be no cause for complaint or disappointment to any while in the latter there should be no one to complain.

Besides the above noted cases, a settlor may also revoke a trust if it was obtained from him by fraud or undue influence or if he executed it under a fundamental mistake or misapprehension as to its effect. But in such cases no trust, in fact or under law, is, strictly speaking, created at all.

It need be added that the revocation of a trust wherever permissible and made will not in any way defeat or prejudice what the trustees may have duly done in the execution of the trust before its being revoked.<sup>3</sup>

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2. See p. 240 supra

3. Section 79, Indian Trusts Act, 1882.

## CHAPTER XXX

### FIDUCIARY RELATIONS

Fiduciary relations signify some relationships which have some of the incidents of trusts. Where some wrong is committed to such relationship the remedy available in the same which exists against the wrongdoer on behalf of the principal or as it exists against a trustee on behalf of the *cestui que* trust. It may arise in the context of a jural relationship or it may not. Where confidence is reposed by one in another, and that leads to a transaction in which there is a conflict of interest and duty, in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence,<sup>1</sup> such fiduciary relationships are very much akin to trust. There are several kinds of relations which can be classified under fiduciary relationship. They are as follows :—

- (1) *Bankers*.—Lord Hatherley in *Burdick v. Garrick*,<sup>2</sup> observed : “A mere banker who takes charge of his customer’s money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is ordinary course of trade to make use of them for his own profit.” Lord Cottenham, L. C. in *Soley v. Hill* said : “Money when paid into a bank ceases altogether to be the money of the principal ; it is then the money of the banker who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker’s hand, is money known by the principal to be placed there for the purpose of being under the control of the banker ; it is the banker’s money.”

A banker becomes trustee with respect to that money which he has been instructed to collect and hold on trust.<sup>3</sup> He acts as trustee also when he is instructed to remit the funds and not to use and repay.<sup>4</sup> However, in *O.A. of Madras v. Smith*,<sup>5</sup> the court refused to accept the banker as a fiduciary. In this case, a customer remitted money to a banker with directions to receive it in fixed deposit together with another sum to be remitted by the customer. Before the further sum was remitted, the banker became insolvent. The plaintiff sought to recover full amount remitted by him. It was held that the plaintiff’s claim failed as the banker was not a fiduciary. The plaintiff could claim such right if the banker was in a fiduciary position.

- (2) *Partner*.—There exists a fiduciary relationship between the existing partners and the former partner or the representative of that partner in a firm.<sup>6</sup> In *Gopinath v. Satis Chandra*,<sup>7</sup> the Allahabad High Court has held that the partners of a firm hold a fiduciary relationship towards their deceased partner’s representatives as regards his interest in the partnership property. Section 88 of the Trusts Act, 1882, only gives a statutory recognition to this principle.

1. *Mrs. Nellie Wapshare v. Pierce Leslie & Co.* Ltd., A. I. R. 1960 Mad. 410.
2. (1870) 5 Ch. A. 233.
3. *In re Brown, Exp. Plitt.*, 60 T. L. R. 397.
4. *In re Holletts Estate*, (1879) 13 Ch.D. 696.
5. 32 Mad. 68.
6. See section 37 of the Partnership Act ; A.I.R. 1954 Pat. 53.
7. A I. R. 1964 All. 53.



And if the profits or the pecuniary advantage or gain can only be determined after taking the accounts of the dissolved partnership, then the suit for rendition of the account would be governed by Article 106 of the Limitation Act. By applying the provisions of section 88 of the Trusts Act, the nature of the suit does not change. Similarly the Punjab High Court observed that "section 88, Trusts Act enjoins upon the partner who remains in possession of the partnership assets *uberrima fides*, as regards the interests of the other partner, that the former must account for the profits which have been accruing as a result of the working of the partnership assets attributable to the share of the former partner. Strictly speaking, a partner is not a trustee of the other partner, but there is no denying the fact, that the partners stand in a fiduciary relation to one another and in such a case equity will never permit the surviving partner to trade or to utilise the property of the other for his exclusive personal profit. If he makes profit, it must be paid over to the owner of the property, the use of which produced the profit. Courts in England have always acted upon the equitable principle."<sup>8</sup>

- (3) *Agent*.—Where the defendant company was the secretary of the company O. V. Estates Ltd. for purposes of the sale and to enter into transaction on their behalf, the fact that the O. V. Estates Ltd. was a different jural entity made no difference in the context of this real situation. The defendant company were secretaries exercising fairly wide powers and functions of looking after the estates under the directions and were not merely administrative assistants. The defendant company were actively engaged in aiding the plaintiffs to sell the estates. The court held that it could not be doubted, upon these facts, that a fiduciary relationship existed between the plaintiffs and the defendant company.<sup>9</sup> In *Burdick v. Garrick*, an agent was appointed by a power of attorney under which he was authorised to receive and invest, to buy real estate and otherwise to deal with the estate. But he was not empowered to apply the money to his own use or to keep it otherwise than a distinct and separate account. Lord Hatherley, L. C. said : "In the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock ; and which money the factor or agent is bound to keep totally distinct and separate from his own money and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position, I am unable to see."
- (4) *Directors of a company*.—The directors and officers of companies are not expressly trustees as the property of the company is not vested in them. "In order to apply section 88 of the Trusts Act to the transaction of sale of the company's lands to its Directors it is necessary to show that the directors have gained for themselves any pecuniary advantage by selling the lands of the company to themselves and their relations at a lower price."<sup>10</sup> Thus

8. 'A. I. R. 1958 Punj. 5.

9. A. I. R. 1960 Mad. 410.

10. [A. I. R. 1965 Pat. 58.

directors discharge certain duties in fiduciary capacity, although they cannot be named as trustees.

- (5) *Trustee de son tort*.—In *Sour v. Ashwell*,<sup>11</sup> Lord Esher said : “The cases seem to decide that where a person has assumed, either with or without consent, to act as trustee of money or other property and has in consequence been in possession of or has exercised command or control over such money or property, a court of equity will impose upon him all the liabilities of an express trustee”. In view of section 10 of the Limitation Act in India, a trustee *de son tort* may plead statute of limitation. The above decision, therefore, is not applicable to India.<sup>12</sup> In case of an express trust, where, however, a stranger intermeddles with the estate, he may be made liable as if he were rightful trustee. Tyabji, J., said in *Moosabhai v. Yacobhai* : “It seems to be established clearly that if express trusts are created and some outside trespasser who has no business to interfere does interfere, then he becomes a trustee *de son tort* and as such the court will make him account as if he were rightful trustee. In that case the executor of a will did not deliver trust property to the trustees appointed under the will.”

In *Kalpada v. Haridasi*,<sup>13</sup> it was, observed : “Trustee *de son tort*” would come within the operation of section 10, Limitation Act, but the existence of a trust must be first established before section 10 may be applied against trustees *de son tort*. Such persons would really come within the ambit of “legal representatives” mentioned in that section which by section 1 (11), Civil Procedure Code, includes person intermeddling with the estate of the deceased.

A trustee *de son tort* cannot be given a decree for possession of trust property alienated though he may be given a declaratory decree that the alienation was not binding on the institution.<sup>14</sup>

- (6) *Guardian*.—The relation between guardian and the ward is fiduciary in nature. The obligations of the guardian are based on a constructive trust rather than on an express trust. Similarly a *de facto* guardian is also in a fiduciary position. In *Abdul Wajid v. Osman Abdul Rubb*,<sup>15</sup> it has been held that a Mohammedan who acts as *de facto* guardian of his brother's property is liable to pay interest on the liquid assets held by him for the minor without proper investments on the principle of section 23 of the Trusts Act.
- (7) *Joint Family Manager*.—The manager in the Joint Hindu family occupies a fiduciary position with respect to all other members of the family. He cannot be said to be trustee of the family, nor does he discharge the duties of a trustee as such. He is not bound to give accounts to other members as in the case between the trustees and *cestui que trust*.<sup>16</sup>
- (8) *Co-sharer*.—Co-sharers are in fiduciary relationship with each other. Where a co-sharer is in exclusive possession and is making use of the common property for personal purposes without the

11. (1893) 2 Q. B. 390.

12. Secretary of State v. Prasad, 46 Mad 259.

13. A. I. R. 1938 Cal. 673.

14. Vasudeva Rao v. Muhammad Rowther, A. I. R. 1944 Mad. 171.

15. (1943) Mad 154.

16. Pervagu v. Subbarayudu, 44 Mad. 656 (P. C.)

knowledge or consent of other co-sharer, it was held that the co-sharer in exclusive possession was in fiduciary capacity and held liable on equitable grounds to pay compensation for diversion of the property.<sup>17</sup>

- (9) *Co-owner*.—There is no fiduciary relationship between the co-owner in possession and the other who is not.<sup>18</sup> A co-owner collecting the entire rent of the joint property is not bound to account with interest to the others for their share of the rent.<sup>19</sup>

The relationship of one co-owner towards another is not strictly of a fiduciary character in the sense that there is an obligation on the part of the co-owner to protect the interest of the other co-owner. The liability ordinarily of one co-owner in possession of the share of all is only to make over the share of all profits of the others to them. He is accountable only for the rents and profits actually received and not what he ought to have received. If he fails to pay the share it can only amount to a breach of the agreement to pay the share whenever it fell due. The possession of a co-owner of the share of the other co-owner cannot be regarded to be in derogation of the rights of the other co-owners within the meaning of section 90 of the Trusts Act.<sup>20</sup>

It is only in a case where it is established on the facts that the co-owner by his dealings derived a benefit or advantage to himself, that section 90 of the Trusts Act would apply and he would be regarded as being in a fiduciary position.<sup>21</sup> There may be special circumstances which would justify the inference that the co-owner had assumed a fiduciary position.<sup>22</sup>

17. A. I. R. 1954 Assam. 33.

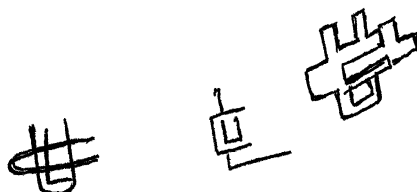
18. *Khem Chand v. Dayaram*, I. L. R. (1940) Ker. 534.

19. *Venkatasubamma v. Subbamma*, (1944) 2 M. L. J. 257.

20. 1897 A. C. 180.

21. A. I. R. 1934 Mad. 686.

22. *Peer Mohideen v. Aisa Bivi*, 67 M. I. J. 563.



## CHAPTER XXXI

### NATURE AND SCOPE OF EQUITABLE REMEDIES

#### Nature of Equitable or Specific Relief.

Relief, in relation to or for the purposes of law, means the remedy which is granted to suitors by Courts of Justice. The two important divisions of relief relevant to the subject under English law are legal relief and equitable relief. Legal relief means and includes all those reliefs which were formerly available through the Common law Courts while equitable relief means and includes such reliefs which were formerly available only in Courts of Equity. In India, equitable relief is commonly known as specific relief and while there is no synonym of its counter-part or legal relief it is generally understood to be and may be termed as compensatory relief. The enquiry as to the nature and scope of equitable remedies under English law has been almost completely covered by that of the origin and development of equity under English law and much of what is given below in this connection is a repetition or can only be a reference to what has been said already on the subject.

The function of civil law is not only to lay down or define the rights of the parties but to provide for and grant relief when a person is prevented from realizing or enjoying his rights or when the right has been infringed ; or to put it reciprocally, when the corresponding duty is not being fulfilled or has been violated. The highest form of protection which may be expected from or should be aimed by the State is to see that no one encroaches upon or intercepts the right of another. Failing that, the aim of the law should be to give a suitor the very thing—or one as nearly equivalent or similar to it as possible—which he is being or has been deprived of. The attitude of the Courts of Equity in England was more conformable to these expectations from or the responsibilities of law and the system of the administration of justice than that of the Common law and, accordingly, it invented and gave relief to litigants which were unknown as to also better and more appropriate than those given by the Common law.

A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient showing that B has led immoral life. This is contrary to A's duty and no amount of damages may possibly be any amends to the wrong done to B. And common law had no process to prevent it. B could not go to common law unless the wrong had been actually done and then could not, thereafter, get any higher satisfaction, except recovering damages from A. But equity gave the appropriate relief in such cases through what is called a *Quia Timet* Bill which was filed in the Court of Chancery for the purpose of quieting a present apprehension of a probable future injury to a person and was granted if it could be shown that the apprehended injury, if it did come, would be substantial and irreparable.

Similarly, where A without any right or justification, digs land or graves from B's land, B could, at law, sue and recover from A the damages which had been, in the estimation of the Court, caused thereby to B. Nothing more was possible. A does the same thing again giving rise to another suit by B and then a third and fourth.....How long or how often was B to go on with such suits. Equity, therefore, invented a more specific cure for such cases and

passed an order—called *injunction*—restraining B from doing the wrongful act.

In the same way the sole redress which common law could afford to a disappointed party in case of a breach of contract was that of damages. It was, therefore, open to contracting party either to perform his duty under the contract or to pay damages and to choose between these two alternatives at his pleasure. Equity, on the other hand, regarded such a remedy as, in many cases, inadequate; and, holding a contracting party bound in conscience to do exactly which he has agreed to do, exercised its authority to compel what is known as *specific performance* of such agreements.

The equitable remedies in general are discretionary in nature. The court in granting these remedies is guided by certain considerations which more or less depend upon their subjective satisfaction. For example, in equity relief is refused to those who had unclean hands or who are not willing to do equity, or who slept on their rights, or whose claim would produce unfair results. Even where the plaintiff has explained his conduct the court may or may not grant remedy.

Specific relief, therefore, means a relief *in specie* which aims at the exact fulfilment of an obligation. It is directed to the obtaining of the very thing which a person is deprived of and ought to be entitled to ask for.

#### Principles upon which Equitable Relief is granted.

The equitable doctrine in respect of the relief that ought to be made available to the parties was as explained above. It does not, however, follow that equity always acted or interfered on the basis of this principle. The general principles upon which an equitable relief could be granted or the limitation within which it could be available may be stated under the following two heads :

- (i) The basis of equitable jurisdiction being the inadequacy of the remedy at law, equity, in a prayer for specific relief, interfered only where there was no Common law relief or the common law relief available was not adequate. Equity did not, accordingly, grant specific relief if there was a legal relief which gives a party full compensation to which he is entitled and places him in a position as beneficial as that through a specific relief.
- (ii) The exercise of this jurisdiction by the Chancellor, like all other equitable jurisdictions, was discretionary and it continues to be so even today both under the English and the Indian law.<sup>1</sup> So the mere fact that the legal remedy is not an adequate relief is not in itself sufficient to give a plaintiff a claim as of right to the assistance of a Court of Equity. The discretion is, however, not capricious or arbitrary, depending upon the mere pleasure of the judge but is exercisable on sound and established principles of equity in its relation to the facts and circumstances of each particular case. In the words of Lindley, L J., “.....when equitable, as distinguished from legal relief is sought, equitable, as distinguished from legal defences may have to be considered.”<sup>2</sup> Though it is not possible to lay down any fixed rule according to which the Courts exercise the equitable jurisdiction in matters

1. See for instance, *Mt. Aisha Bi v. Muhammad Sadiq*, 5 P. R. (1891) where Plowden, J., said, “... when a plaintiff resorts to an Indian Court he has not an absolute right to insist upon the assistance of the Court.”

2. *Knight v. Simmonds*, (1896) 2 Ch. 294, 297.

of specific relief yet the leading principles generally applicable in all cases are those embodied in the maxims :

- (a) He who comes to equity must come with clean hands ;
- (b) He who seeks equity must do equity ;
- (c) Delay defeats equity.

In India, the law on specific relief was codified under the Specific Relief Act, 1877. The underlying principles of the whole Act are obviously the same as those which originated in and were formerly applied by the Court of Chancery in England. The provisions are similar and the rules for the exercise of the discretion by the Court in granting or refusing specific relief are almost identical. This is clearly indicated by the following speech preceding the introduction of the Bill in the Council. After a brief reference to the legal and equitable relief under English law, it was observed :

"In India, we possessed the great advantage of having a single Court for the purpose of administering every kind of justice by which we were enabled to get rid of many refinement and subtleties which beset this kind of jurisdiction as administered by the Court of Chancery. But still the inherent difference between the two great classes of relief (legal or compensatory and equitable or specific) and there remained the fact that the former of these, namely, specific relief, though more exact, was delicate and more difficult to administer, and that it required more skill and care on the part of the judge, and that some guidance of the Legislature would, therefore, be acceptable to him."<sup>3</sup>

The Specific Relief Act, 1877 has now been repealed and re-enacted by the Specific Relief Act, 1963. It may be useful to reproduce here the main changes introduced by the new Act leaving the details for discussion under the appropriate heads :

- (i) All the illustrations under the old Act have been omitted on the ground as indicated in the report of the Law Commission : "that the illustrations have not on the whole, served to clarify the provisions of the Act. Some of the illustrations are not warranted by the term of the relevant sections ; others have tended to prevent the development of equitable jurisprudence. Moreover, the Indian legislature has for some time given up the practice of inserting illustrations in Acts." Apart from the practice of Indian legislature one may find it difficult to agree with criticism on the merits of illustrations.
- (ii) Section 6 which replaces Section 9 of the old Act on 'possessory relief' reincorporates the limitation of six months for the suit which were in 1891 transferred from this to the Limitation Act.
- (iii) Section 9 of the new Act makes a general provision that in case of reliefs based on a contract, the defendant may plead any defence available to him under any law relating to contracts. In view of this, specific provisions on particular defences under the old Act became unnecessary and have been dropped.
- (iv) Section 15 of the old Act on specific performance of a part of the contract where the part incapable of performance formed a considerable portion of the whole allowed specific performance at the instance of the other party if he paid the stipulated

consideration and gave up all claims for compensation in lieu of the unperformed part of the contract. Section 12 (3) of the new Act re-enacts Section 15 of the old Act with this modification that if the unperformed part though large admits of compensation, specific performance would be available on payment of the proportionate reduction of the agreed consideration.

- (v) The controversial provisions of Section 13 of the old Act on a contract where a portion of its subject-matter existing at the time of the contract had ceased to exist at the time of the performance, stands repealed and now assimilated in the provisions on part-performance of contracts by means of the explanation to Section 12.
- (vi) Express provision in the Act [Section 14 (3) (c)] has now been made on the specific performance of building contracts.
- (vii) The doubt regarding the applicability of the doctrine of mutuality to specific performance of contracts has been removed by making an express provision against its applicability—Section 20 (4).
- (viii) Chapters VII (Section 44) and VIII (Sections 45 to 51) on appointment of a Receiver and enforcement of public duties have been deleted.
- (ix) The procedural law (covered even otherwise by the Code of Civil Procedure) that no relief will be granted unless it is expressly prayed for in the plaint or if not so prayed unless introduced through amendment has been added in a number of sections, *e. g.*, 16, 21, 26, 40.

#### Classification of Equitable Reliefs.

The most important heads of equitable remedies are two : *viz.* specific performance of contracts and injunctions but there are many others and the different classes or modes of granting specific relief may be summarized in reference to the provisions of the Specific Relief Act, 1963<sup>3a</sup> :—

- (i) by taking possession of certain property and delivering it to a claimant, *i. e.*, Recovery of possession of property—Sections 5 to 8 ;
- (ii) by ordering a party to do the very act which he is under an obligation to do, *i. e.*, specific performance of contracts—Sections 9 to 25 ;
- (iii) by preventing a party from doing that which he is under an obligation not to do, *i. e.* Injunction—Sections 36 to 42 ;
- (iv) by determining and declaring the rights of parties otherwise than by an award of compensation, *i. e.* Declaratory decrees—Sections 34 and 35.

In addition to these four classes of cases of an equitable relief, the Act includes and provides for the following :

- (v) Rectification of instruments—Section 26 ;
- (vi) Rescission of contracts—Sections 27 to 30 ;
- (vii) Cancellation of instruments—Sections 31 to 33.

Reference in this connection may also be made to Section 4 of the Act

3a. The provision for the appointment of Receivers under Section 44 of the old Act now stands repealed.

which reserves specific relief to enforcement of individual civil rights and makes a negative provision to the effect that specific relief cannot be granted "for the mere purpose of enforcing penal law." It follows from the fact that Court of Chancery in England were concerned solely with the exercise of civil jurisdiction and never interfered in the sphere of criminal law. The jurisdiction in respect of specific relief was accordingly to the enforcement or protection of civil rights of person or property and was not exercised and cannot be invoked for the purpose of enforcing penal law. It is, however, important to note that the prohibition is, as sufficiently indicated by the use of the word "merely" in the section, confined to cases where the enforcement of penal law is the sole object and result of the relief sought. So the mere fact that the wrong complained of amounts to crime will not be a bar to specific relief if the protection sought or relief claimed is with regard to the civil right touching or affecting the person or property of the plaintiff. Thus the fact that libel is a crime does not stand in the way of the plaintiff seeking injunction against the publication of a libellous statement against him. In *Emperor of Austria v. Day and Kosuth*<sup>4</sup> where injunction was prayed for and granted against printing and issuing of notes or public securities of the Kingdom of Hungary purporting to be issued in the name of the nation, Turner, L. J. observed, "It is not on the ground of any criminal offence committed or for the purpose of giving a better remedy in the case of a criminal offence that this Court is, or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this Court must rest."

It need also be noted that the heads of specific relief enumerated above do not exhaust all the reliefs originating in or peculiar to the Court of Chancery in England or available under the Indian law. There were others also falling mainly under the auxiliary jurisdiction<sup>5</sup> e. g., discovery of facts or documents in the course of an action; Bills for the perpetuation of testimony, etc., which were obtainable in equity in aid of the defective procedure at law. The distinguishable characteristic of the remedies belonging to this group is a that they determine no primary rights, and grant no final reliefs, either directly or indirectly. These remedies are in every sense ancillary and provisional. As observed by Strahan,<sup>6</sup> these may properly be regarded as matters of procedure; and information as to them should, therefore, be sought in works on Practice and Evidence, rather than in a text-book on the principles of Equity. The relevant provisions on these matters are, under the Indian law, laid down in the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

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4. (1861) 3 De. G. F. & J. 234.

5. See pp. 25-26 supra.

6. Strahan's Digest of Equity, 3rd. ed., p. 386.



## **CHAPTER XXXII**

### **RECOVERY OF PROPERTY**

#### **Nature and Scope of Enquiry.**

There are various modes of the acquisition of property, some of the common and better known of these being inheritance through descent or a will, transfer through sale and gift, etc. and prescription based on possession of a certain kind and for a certain length of time. The title or interest in the property which a person may acquire in such cases may be absolute, qualified or possessory. The question which arises for consideration in relation to the subject under investigation is what is the relief that is, or ought to be, available to a person who has been deprived of his property howsoever it may have been acquired and whatever may be the nature and extent of interest in that property. In the preceding Chapter it has been explained that if A has entered into a contract with B, say, for the purchase of a property, A would be entitled to the specific performance of his contract if the legal or compensatory relief would not be adequate or complete relief. How does it differ from the one under consideration and why should not these same principles apply or the same relief be available in both the cases. It may be pointed out that in the former the right to recover property vested in law is in question while in the latter what is involved is the right to acquire property vested in equity. The obligation or duty in the former arises under the general law and is an incident of ownership or possession while that under the latter arises through the voluntary acts of the parties and is an incident of contract. There are, therefore, stronger reasons for specific relief in the former cases or class of cases than in the latter and the burden in the former should be on the defendant to show cause why specific relief should not be granted unlike that in the case of the latter where it is for the plaintiff to show why specific relief should be given.

It is, thus clear on principles that if a person is deprived of his property or of any right or interest therein he should, more as a rule than by way of exception, be entitled to get the very property or to have and enjoy the very right or interest which is his and of which he is being deprived rather than the pecuniary satisfaction in form of damages. The Specific Relief Act, 1877 lays down the law on the point under two heads; viz. immovable and movable property and it is necessary to examine separately the relevant provisions with regard to the nature and requisites of specific relief in each case.

#### **RECOVERY OF IMMOVABLE PROPERTY**

The Specific Relief Act, 1877 contemplates and provides for two classes of actions with regard to the recovery of the possession of immovable property, firstly those where the claim is based on title; and secondly, those where the claim is based on possession merely.

##### **Recovery on the Strength of Title.**

Section 5 of the Specific Relief Act, 1963 (replacing Section 8 of the old Act) provides: "A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure."

There is not much of importance or speciality in these actions. A person who seeks to recover immovable property on the strength of his title to the same is required to file a regular suit which involves a long drawn procedure

and the decision in which is given after a thorough and complete investigation of the relative claims and defences which may be advanced by the parties. Such a decision is subject to the normal or regular procedure of law with regard to appeal or review. It need be noticed that the term 'title' in this section includes title based on mere possession of a property and a person in this situation has his option either to bring a regular suit under this section in which case he must establish his title to be better than the defendant or, conditions being fulfilled, under the next section. So, this section applies to and covers all cases for the recovery of possession of immovable property including those for which a special action or procedure is permissible under the next section.

If the plaintiff's suit for the recovery of possession of immovable property is decreed he may get it executed under Rule 35 or 36, as the case may be, of Order 21 of the Code of Civil Procedure, the general rule of which is that "where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged a, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."<sup>1</sup> What is relevant and worthy of notice for the present purpose is that the plaintiff gets or the defendant is obliged or constrained to give the very property and not merely damages for retaining or continuing to retain the property.

#### Recovery on the Strength of Possession.<sup>1a</sup>

Section 6 of the Specific Relief Act, 1963 (replacing Section 9 of the old Act) enables a person to regain the possession of an immovable property of which he has been dispossessed without his consent and otherwise than through the authority and process of law. The peculiarity of an action under this section lies in the fact that it affords a summary procedure for restoring the *status quo ante* without allowing the question of title to be raised or decided in that proceeding.

So, if A is in possession of a house or a piece of land and he is dispossessed of the same by B, A is entitled to sue B under this section and regain possession of the property although B may be the owner or may have the right to the possession of the property.

The section is practically a reproduction of Section 15 of the Indian Limitation Act, 1859. These provisions are based upon the old English writ of assize (which proved the title of the defendant merely by showing his or his ancestor's possession) which in its turn seems to have been founded on the *interdictum de vi* of the Roman Law. The writs of assize were abolished in England by Section 35 of the Real Property Limitation Act, 1833 and the law is now settled that the rightful owner of property has a right of re-entry on his premises which he can exercise himself without the assistance or medium of a Court of law provided he is able to do it, "in a peaceable and easy manner." The Indian law on the point thus becomes contrary to that under English law for here even a rightful owner cannot resort to self-help and must necessarily enforce his right to possession through proper legal procedure and if he acts otherwise his entry would not be legal and he is liable to be dispossessed at the instance of the person dispossessed by him. The object of the law is to prevent or dis-

1. O. 21, R. 35 (1).

1a. The Law Commission recommended (Dr. N. C. Sen Gupta dissenting) omission of this relief but the Joint Committee of both the Houses preferred its retention and accordingly the provisions have been re-enacted.

courage persons from taking the law in their own hands and disturbing the peaceful, though not the rightful possession of others.

The *requisites* for the relief under Section 6 of the Specific Relief Act, 1963 are :

1. The plaintiff must establish his "juridical possession" at the time of dispossession. Juridical possession is not equivalent to lawful possession. If a person has the possession of the property as a fact and once he becomes settled as such, it is enough for the purposes of relief under this section irrespective of his being without any right to the same or a mere trespasser. So, a tenant holding over after the expiry of his tenancy is entitled to sue his landlord under this section and recover possession of the property if he has been forcibly dispossessed by him. But a person whose entry is sudden and has not been acquiesced in by others or the opposite party does not fulfil the requirement of and cannot sue under this section. Similarly, a person claiming possession on another's behalf is not entitled to sue under this section.

2. The plaintiff must have been dispossessed without his consent and otherwise than in due course of law. It follows from the very foundation of this section that a legal right can be protected or enforced only by consent or through the medium of law. So if A who was in possession hands over the possession under, for example, a mistake that B is the rightful owner, cannot sue under this section. His only remedy would then be under Section 5 of the Act.

3. The suit under this section must be instituted within six months from the date of dispossession. It originally formed part of the section itself. It was subsequently repealed by Section 2 and Schedule I of the Amending Act, (XII) of 1891, but was re-enacted and contained in Article 3 of the Indian Limitation Act, 1908. The provision has once again been brought back from the Limitation to Specific Relief Act.

There is a conflict of judicial opinion on the point whether a person who has been dispossessed of immovable property but has failed to sue under this section within six months, can, in a regular suit against a trespasser as—contrasted with the title paramount or true owner—succeed on his previous possession.

The High Court of Bombay,<sup>2</sup> Madras<sup>3</sup> and Allahabad<sup>4</sup> have, on the principle that possession is a good title against the whole world except the true owner, held that he can succeed on the strength of his previous possession.

The Calcutta High Court<sup>5</sup> has, on the other hand, taken the contrary view on the ground that the only case in which a plaintiff having no title except possession can succeed is that provided for under Section 9 corresponding to Section 6 of the present Act of the Act. Failing to avail of that by not coming within six months of his dispossession, he must come under Section 8 of the Act and therein can succeed only on the strength of title which, if based on possession, must be the statutory period of 12 years necessary for such title.<sup>6a</sup>

In a recent case the Assam High Court preferred to follow the Calcutta view.

It is generally recognised that the former view of the matter is correct. It is, however, submitted that the view taken by the Calcutta High Court is

2. Premraj v. Narain Shiva, 6 Bom. 218.

3. Narain v. Dharmachar, 26 M. 514.

4. Wali Ahmed v. Ajudhia Kandu, 13 All. 537.

5. Nisha Chand v. Kali Charan, 26 C. 579.

6a. Md Hanif Mia v. Haladhar Ishker A. I. R. 1950 Assam 226

correct. A simple way of looking at the proposition is that Section 6 of the Act affords a special remedy to the party illegally dispossessed and in order to avail of it he must, like any other period of limitation come within six months of the accrual of the cause of action and if he does not, the relief becomes barred just as the relief to an owner who fails to come within twelve years becomes barred by time.

The following points may be noted with regard to the scope of the relief under this section :

1. No matter how good the title of the dispossessor, the person previously in possession is entitled to be restored to possession.
2. The Court, under this section will try no question of title. It will simply determine as a question of fact whether the plaintiff was formerly in possession and was dispossessed by the defendant.
3. A decree or order under this section does not prejudice or improve the claim or title of either party. The final adjudication of title is left to be determined by a regular suit.
4. A decree under this section should be confined to directing delivery of possession to the plaintiff. The Court has no power under this section to award mesne profit or any other compensation.
5. No suit under this section can be brought against the Government. Consequently a person who is dispossessed by the Government even though without consent and otherwise than in due course of law cannot avail of his prior possession. He must, to recover possession, bring a regular suit and establish his title.
6. An order or decree under this section is final in the sense that it is not open to review or appeal, although it is subject to revision by the High Court where jurisdiction has been shirked or wrongly assumed.

## RECOVERY OF MOVABLE PROPERTY

### Introductory

The law with regard to the recovery of possession of specific movable property is contained in Sections 7 and 8 of the Specific Relief Act, 1933, which embody the English rules as to an action of detinue.

Detinue may be defined as an action by a plaintiff who seeks to recover the goods in *specie*, or on the failure thereof the value, and also damages for the detention. The grounds of an action of detinue are :

- (i) There must be some specific article of movable property capable of being recovered in *specie*, and of being seized and delivered up to the winning party ;
- (ii) The right to such property must be in the plaintiff. Such right may be absolute or special or only temporary. All that is essential is that the plaintiff must have in him the immediate right to the possession of the chattel at the time of the action ;
- (iii) The possession of the property must be with the defendant by, for example, bailment, finding, *etc.* and there must be an unjust detention of the same on his part.

The writ in an action for detinue demanded specific delivery of the pro-

erty. But owing to the defective procedure for the execution of the Common law judgments this could not in practice be enforced and the defendant had, till the Common Law Procedure Act, 1854, always a right to keep the article if he paid its value. The Court of Equity, when applied for relief in such cases, intervened only in those cases where the common law relief of damages was not adequate or appropriate. Such cases usually fell under either of the following two categories :

- (a) Where due to the peculiar value or association or importance of the property in question, the plaintiff could not be adequately compensated in terms of money ;
- (b) Where the party withholding the possession of the property stood in a fiduciary relationship to the plaintiff, *e. g.*, trustee, agent or broker. The relief in such cases did not depend on the nature of the property or the inadequacy of compensatory relief but solely on the relationship of the parties.

By Section 78 of the Common Law Procedure Act, 1854, an order for the specific delivery of a chattel was made available in an action of detinue without the intervention of equity. The form of action of detinue was abolished in England by the Judicature Acts, 1873-75, but an action brought for the return of a specific chattel is still called an action of detinue.

#### **Relief under Section 7 of the Act.**

Section 7 of the Specific Relief Act, 1963 entitles a person to bring a regular suit for recovery of possession of movable property if he has a right to the same at the time of action. The requisites are the same as enumerated above for an action for detinue. It is important to note that the nature or the quality of the property in question is immaterial and the relief claimed is for the recovery of the property or in the alternative for compensation.<sup>6</sup> The decree, if passed, is for the delivery of property stating at the same time the amount of money to be paid as an alternative if delivery cannot be had.

It should be specially noted that the plaintiff need not be the absolute owner of property. He may be a limited owner or his right to possession may be special or temporary. The only relevant question for decision is whether he has the immediate right to the possession of the property as against the defendant. This was clearly explained by the following illustrations in the old Act.

A deposits books and papers for safe custody with B. B loses them and C finds them but refuses to deliver them to B. B, though not the owner, is entitled to recover them from C.

A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such property therein as entitles him to recover it from B.

A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

#### **Equitable relief under Section 8 of the Act.**

Section 8 of the Specific Relief Act, 1963 which is analogous to the equit-

6. See form no. 32, Sch. I, App. A of the Code of Civil Procedure, 1908.

able relief of English law in an action of detinue, entitles a person to recover the specific movable property itself from the defendant who is not the owner thereof in cases where the property has a peculiar value or association and cannot be adequately compensated for in terms of money. Here the relief claimed is the recovery of the property itself and the grounds on which the specific relief is based must be set out<sup>7</sup> in the plaint and satisfactorily proved.

A person entitled to the immediate possession of specific movable property can, according to provisions of Section 8, recover it in any of the following four classes of cases:—

- (i) Where the article has, by reason of peculiar associations, obtained in the eyes of its holder a value that cannot be estimated in any ordinary medium of exchange, *e. g.*, a family idol, heirlooms, private letters or a cup won as a prize. Here the ordinary or market value of the article is estimable but it cannot be adequate compensation to the plaintiff.
- (ii) Where the article is of such a great rarity or value that it cannot be replaced by money, *e. g.* a picture by a dead painter or rare china vases. Here the market value of the article is itself inestimable. Here it is so much a matter of aesthetic sensibility and artistic taste that different persons will put different value on the articles.
- (iii) Where the party withholding the thing stands in a fiduciary relation to the person entitled to its possession, *e. g.* an agent or a trustee under an express, implied or constructive trust. In such cases, the nature of the property is immaterial. Trusts fell within the exclusive jurisdiction of equity and the principle of relief in such cases was not the inadequacy of legal relief but the unconscionable act of the defendant.
- (iv) Where the possession of the thing claimed has been wrongfully transferred from the claimant. The principle, in such cases, is analogous to that under the preceding head. The section under the earlier Act while containing illustrations on the first three cases, omitted to add one under this head and there does not seem to be any judicial authority on this point. It is difficult, therefore, to define exactly the scope of cases falling under this category. It appears that this clause was framed to provide for transferees from trustees, actual or constructive with notice that such trustee has no right to transfer the property in question. The *bona fide* purchaser for value without notice becoming the owner, is excepted by the provision "of which he (defendant) is not the owner."

The newly added explanation to this section requires that the court shall, unless the contrary is proved, presume in cases falling under heads (i) and (ii) above that compensation in money would not afford adequate relief or that it would be extremely difficult to ascertain the actual damage for the loss of the thing claimed.

#### **Difference between the provisions of Sections 7 and 8.**

The provisions of sections 7 and 8 are distinguishable in the following respects :—

7. See form 39, Sch. I., App. A. of the Code of Civil Procedure, 1908.

- \* (a) The relief under section 7 is general and independent of the nature of the property or the relationship between the parties. The relief under section 8, on the other hand, is special and depends upon the nature of the property or the relationship between the parties as given under the above four heads ;
  - (b) The relief claimed and the decree made under Section 7 is for possession alternated with compensation equal to the value of the property. The relief claimed and given under Section 8 is for the delivery of the specific movable property ;
  - (c) A suit under Section 7 is maintainable against even the owner of the property if the immediate right to possession vests in the plaintiff and not in the owner ; while under Section 8, the suit is not maintainable against the owner.
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## CHAPTER XXXIII

### SPECIFIC PERFORMANCE OF CONTRACTS

#### Introductory.

"Specific performance", as defined by Pomeroy, 'consists in the contracting party's exact fulfilment of the obligation which he has assumed—in his doing or omitting the very act which he has undertaken to do or omit.'<sup>1</sup>

Specific performance in this sense includes both positive and negative stipulations but the term specific performance, strictly so called or as generally understood, is confined to positive obligations and the relief in respect of negative stipulations is called injunction. The principle on which the relief of specific performance is granted may be best explained through the following passage from Story's Equity Jurisprudence :

"It is well known that by the common law every covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract or covenant ; and as such, if it is unperformed by the party, no redress can be had, except in damages ; this is in effect, in all cases, allowing the party the election either to pay damages, or to perform the contract or covenant at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice ; and, considering it a violation of moral and equitable duties, they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse."<sup>2</sup>

So if A has contracted with B to sell his house to him for Rs. 50,000/-, equity would compel A, at the instance of B, to perform his part of the contract *in specie*, that is by transferring the house to B and do all other acts that may be necessary to effectuate the sale. But at the same time, if the contract relates to the sale of an ordinary article of merchandise, say, corn or coal which is easily available in the market, equity would not decree specific performance but leave the parties to their relief of damages at common law. What is the foundation for the difference in relief between these two classes of cases ? It is against conscience that a party should have a right of election whether he will perform his contract or only pay damages for the breach and it should, as a matter of conscience or for the purposes of a court of equity, make no difference whatsoever whether the subject-matter of the contract is general or special, common or uncommon or whether it is not one which is even otherwise available at all or with difficulty. On general or strict principles, therefore, there is no justification in limiting the equitable relief of specific performance to certain kinds of contracts. The limitation has, however, its explanation in the fact that specific performance fell within the concurrent jurisdiction of the Court of the Chancery wherein it intervened only if the legal relief was inadequate or inappropriate. Accordingly, wherever compensation in money could be a reasonable substitution or measure for the non-performance of the contract, there was no occasion for the exercise of the equitable jurisdiction and the party was left to his remedy in damages.

1. Pomeroy's Specific Performance of Contracts, 3rd ed., pp. 4-5.
2. Story's Equity Jurisprudence, 3rd ed., p. 477.



It need be noted that the specific performance of a contract can be had at the instance of both the vendor and the purchaser or the lessor and the lessee. If, it may be enquired, the inadequacy of damages be the sole criterion or requisite of specific performance why should the vendor or the lessor be entitled to insist on specific performance. He has the land and may recover from the vendee or the lessee the difference between the consideration agreed upon and the actual or estimated consideration on a subsequent sale or lease. Specific performance was, however, in such cases based on the doctrine, which the Chancery found convenient to apply for the spread of its jurisdiction, that 'remedies should be mutual'. So, if the contract was of such a nature that equity would decree specific performance at the suit of one party, it would decree specific performance at the suit of the other as well.

So the first and the main question that arises for consideration on the subject of specific performance is what contracts are specifically enforced. This may be conveniently taken up under two heads: affirmatively and negatively. Then there may be a case which is of a kind of which specific performance may be given but the defendant has some defence available to him on the principles of equity or according to some legal rule, *e. g.* fraud *etc.* and specific performance cannot accordingly be decreed. Ordinarily and very obviously too, the actual parties to a contract are involved in an action for specific performance but it becomes necessary to enquire whether the equitable obligation extends beyond or binds persons other than the actual parties to the contract. The whole subject of specific performance may, therefore, be split up for consideration under the following five heads:

1. Contracts which may be specifically enforced.
2. Contracts which cannot be specifically enforced.
3. Defences to an action for specific performance.
4. Judgment and Reliefs.
5. Parties to an action for specific performance.

Reference need here be made to section 25 of the Specific Relief Act, 1963, which says that the provisions of the chapter on Specific Performance of Contracts shall apply to awards to which the Arbitration Act, 1940, does not apply and directions in a will or codicil to execute a particular settlement. It need be added further that section 43 of the Specific Relief Act, 1963, amends section 32 of the Arbitration Act, 1940, by extending the law to 'enforcement of award' also.

In both these cases there is only an enforcement of an obligation resting on or undertaken by the defendant. The principle underlying an award is clearly explained in the words of Lord Eldon, "the award supposes an agreement between the parties and contains no more than the terms of the agreement ascertained by a third person."<sup>3</sup> With regard to directions under a settlement the principle is the same as that of a trust and the law with regard to their enforcement is the same as of a trust—executed or executory. It is, however, difficult to see why this section should have provided for a will alone and not settlements *inter vivos*.

## CONTRACTS WHICH MAY BE SPECIFICALLY ENFORCED

### The general Rule.

It may be stated, as a general rule, that a contract will be enforced *in*

3. Wood v. Griffith, (1818) 1 Sw. 43.

*specie* only where the ends of justice cannot be served by awarding damages. Such cases in particular, as classified by Pomeroy,<sup>4</sup> are :

- (i) Where the subject-matter of the contract is of such a special nature or of such a peculiar value that damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representation of the subject-matter in the hands of the party who is entitled to its benefit—*or, in brief, where damages, ascertained from its pecuniary estimate, are inadequate.*
- (ii) Where from some special and practical features or incidents of the contract inhering either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty so that no real compensation can be obtained by means of an action at law—*or, in brief, where damages are impracticable or incapable of a pecuniary measure.*

So, where A agrees to sell to B a silver tobacco box which belonged to B but had been sold outside B's family sometime in distress, the contract may be specifically enforced because its value to B is much more or different and higher than its weight in silver or than what it would be to X, Y and Z. The same principle would apply if there is a contract between X and Y for the sale of a house in which Y was born.

The latter class of cases may be illustrated by a contract for the sale of a picture by a dead painter or some rare China vases, which will be specifically enforced for there is no standard for ascertaining the actual damages which would be caused by the non-performance of the contract.

These are only the leading rules in abstract form and the question whether any of these holds good or may reasonably be applied in a particular case depends upon and must be decided in relation to the peculiar facts and circumstances of each case. It may, however, be noted that the Courts have, with regard to the exercise of discretion in granting specific performance, drawn a distinction between immovable and movable properties which has been summed up by Maitland as follows :

"On the whole I think that we may say that specific performance applies to agreements for the sale or the lease of lands as a matter of course ; its application outside these limits is some what exceptional and discretionary."<sup>5</sup>

The distinction is based on the following grounds :

- (i) Ordinarily, land, unlike chattels, has a peculiar and special value and it is not possible for the Court to ascertain its pecuniary measure. Contrasting the case of stock with that of land it was observed by Lord Macclesfield<sup>6</sup> that one piece of land may have a fancy value, another none at all, in the eyes of a prospective purchaser, and yet the two pieces may be of precisely equal value ; whereas there can be no difference between one man's stock and another.
- (ii) Where the subject-matter of contract is land it is impossible or, at any rate, very difficult to have the benefit of the contract by means

4. Pomeroy's Equity Jurisprudence, 5th ed., Vol. IV, pp. 1033-34.

5. Maitland's Equity, 1916 ed., p. 304.

6. Cudd v. Rutter, (1719) 1 P. Wms. 570.

of damages which may be awarded in lieu of it. This is not so in case of things other than land.

The equitable rules with regard to contracts which are specifically enforceable as set out in section 12 of the Specific Relief Act, 1877, ran as follows :

“Except as otherwise provided in this Chapter the specific performance of any contract may in the discretion of the Court be enforced—

“(a) when the act agreed to be done is in the performance wholly or partly, of a trust ;

“(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of that act agreed to be done ;

“(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

“(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.”

The section then added an explanation to say that, “Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer movable property can be thus relieved”.

The presumption was not rebutted merely by the fact that the parties had provided for recovery of damages by the buyer of the immovable property although that would be one of the considerations in determining the question of the adequacy of the relief of damages.<sup>7</sup>

Commenting on clauses (a) and (d) of this section in the earlier editions of this book it was observed as follows :

“With regard to clause (a) it may be said that it does not, strictly speaking, fall within the purview of specific performance of contracts. A person's obligation to do something may be the result of a contract or may arise otherwise than through a contract, and although the principle for specific relief in the latter class of cases may be the same but there is much of difference between the two. Clause (d) is only a species of the latter class of cases. It applies to obligation arising by virtue of a trust be it express, implied or constructive. Such cases are distinguished on the ground that a trust fell within the exclusive jurisdiction of the Chancery for which there was no relief at all at law and it must, therefore, be enforced in all cases irrespective of the nature or the quality of its subject-matter. This clause is clearly explained by the following illustration added to it.

A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B, and B may enforce specific performance of this obligation. It may be noted that the subject-matter of the obligation is stock of which no specific performance is ordinarily decreed.

The scope of clause (d) is sought to be explained by means of the following illustration added to it :

A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent and C is appointed his

assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

The meaning of the illustration is, in so far as insolvency is concerned, clear because the person directly subject to the obligation and thus to the liability to pay damages is left with no property and as such it should be made good by his assignee in bankruptcy. But it is difficult to say whether this clause should rest on the doctrine of part-performance together with the rule that a contract binds the parties and ordinarily their representatives in interest too or it may be taken to represent a distinct class of cases wherein the failure to comply with the necessary formalities would be made good by obligating the party bound to complete it.'

Section 10 of the Specific Relief Act, 1963, which replaces section 12 of the old Act, leaves out clauses (a) and (d). The explanation providing for the presumption is retained with this modification that the presumption in case of movables has been subjected to two exceptions : (i) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff or consists of goods which are not easily obtainable in the market ; (ii) where the property is held by the defendant as agent or trustee of the plaintiff. The second exception is only a partial re-enactment of clause (a) in the old Act and the first is covered by or only illustrative without being exhaustive of the two clauses retained in the section. There was, it is submitted, no need to add these exceptions.

Clause (d) of section 12 was so read as to be limited to the illustration appended to it and on the view of Dr. Banerji<sup>7a</sup> that it seemed to sanction the doubtful doctrine that insolvency of the defendant is a ground for decreeing specific performance, it has been deleted.

## SPECIFIC PERFORMANCE WITH A VARIATION

### Scope of Inquiry.

In stating or explaining the general principles with regard to the relief of specific performance of contracts it has been assumed and, of course, it is generally so, that the specific performance sought or granted is of the contract in its entirety or in accordance with the actual or exact terms of the agreement. There may, however, be cases wherein the contract is incapable of being performed or enforced in its entirety or in accordance with its actual or exact terms and the question arises whether specific performance of such contracts may be prayed for or granted with such variation in the terms as may be necessary and reasonable under the circumstances. The question need be split up and examined under two heads : (A) When there is no difference between the parties with regard to the actual terms of the agreement between them but it turns out that the contract cannot, owing to some misunderstanding or mis-description either in respect of the quality or the quantity of the subject-matter, be specifically enforced in its entirety ; (B) Where the terms of the contract as are supposed to be in existence or are found to be on record do not represent the real or actual terms of the agreement between the parties as it initially was or subsequently came to be.

#### (A) Contracts incapable of enforcement in their entirety.

The question for consideration is these cases in whether, and if so, under

7a. Law of Specific Relief, 2nd ed., p. 84.

what circumstances, the parties may seek or the Court grant specific performance of as much of the contract as is capable of performance. The Indian law on the point which was exactly the same as English law and contained in sections 14 to 17 of the Specific Relief Act, 1877 is now provided for by section 12 of the 1963 Act.

It is of the essence of specific performance that part only of an agreement should not be enforced. Parties, when they enter into a contract, do not contemplate a partial or lop-sided performance of it. Equity also requires that if there is to be specific performance, it should be specific performance of the contract in its entirety and not only of a part of it and that the Court must abstain from remodelling contracts. "The Court", said Lord Eldon, "is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for and not be compelled to take that which he did not mean to have."<sup>8</sup> The general rule,<sup>9</sup> therefore, is that the Court shall not grant specific performance of only a part of the contract. Thus, in *Re Puckett and Smith*,<sup>10</sup> the parties were clearly dealing with each other on the understanding that the land was required for building. After the contract had been entered into, an underground culvert was discovered, of which the existence was previously unknown to both parties and no reasonable inspection would have revealed it. It was held that as the culvert constituted a substantial drawback to the use of the land for building purposes, the purchaser would not be getting what he had bargained for and so the sale could not be enforced. The rule applies whether the defect or deficiency is as to the nature or state of the property or to the acreage or quantity of the land or property or the vendor's interest in it. So a purchaser who has contracted to buy a lease cannot be compelled to take an underlease.

There are, however, two exceptions, to the general rule :

- (i) Equity requires substantial and not literal fulfilment of engagements and so where the essence of the contract cannot be performed, little circumstances which are non-essential may be neglected. Specific performance of a part of the contract may, therefore, be enforced<sup>11</sup> provided :
  - (a) that which cannot be performed is inconsiderable and immaterial, and
  - (b) that such defect or deficiency is capable of being evaluated or compensated for in money.

If these conditions are fulfilled specific performance of the contract may be enforced by either the promisor or the promisee subject to the vendor making reasonable compensation for the deficiency in value. This is generally said to be a case of *specific performance with compensation*.

A contracts to sell B a piece of land consisting of 100 bighas for Rs. 10,000/-. It turns out that only 98 bighas of the land belong to and are transferable by A. If the two bighas of land are not substantial and may be reasonably compensated for in terms of money, specific performance in respect of 98 bighas of land may be had at the instance of either A or B for, say, Rs. 9,800/-.

But if the above two bighas of land are substantial e. g., they cut off the

8. *Knatchbull v. Grueber*, (1817) 3 Mer. 124, 146.

9. Section 12 (1), Specific Relief Act, 1963.

10. (1902) 2 Ch. 258.

11. Section 12 (2), Specific Relief Act, 1963.

remaining 98 bighas of land from the main road or from B's house or farm, specific performance of the contract cannot be decreed. Similarly, if there is a contract for the sale of an agricultural land and it subsequently turns out that there is no right of cartway to it, specific performance cannot be enforced.

The exception is based on the probable or presumptive conduct of the parties themselves. If A and B meet for the purpose of negotiating the sale of 100 bighas of land and shortly before or after the agreement they discover that only 98 bighas of that land belong to and may be sold by A. If those two bighas of land are not substantial none of them would, simply for that reason, give up the contract but conclude the same with a proportionate or reasonable diminution in the consideration. It should make no difference if the same thing is done afterwards or through the Court. It would, therefore, be unfair for either party to rely upon or make any such protest to avoid the contract.

#### Law under the old Act.

- (ii) Where the essence of the contract cannot be performed and a party cannot have the substantial benefit of the contract, it cannot be forced upon him by the other party, but the party not in default may, at his option, enforce or accept such performance as is practicable provided he pays the whole consideration and gives up all further right as to unperformed part in respect of the contract.<sup>12</sup> This is generally said to be a case of *specific performance with abatement*.

So if in the aforesaid illustration it turns out that only 50 bighas of land belong to A or that though 98 bighas of land belong to A but the remaining 2 bighas are material for its enjoyment, it is not open to A to insist upon specific performance but B may have it provided he pays the whole consideration unreservedly to A for only 50 or 98 bighas of the land.

This exception is based on the principle of equitable estoppel. "If", said Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."<sup>13</sup>

#### Law under the new Act.

The Act of 1963<sup>13a</sup> makes a material alteration in the law on this point in so far as it allows specific performance of those contracts where a considerable portion admitting of compensation must be left unperformed (at the instance of the other party) not for the whole of the stipulated consideration but only for that portion of it which remains after the proportionate deduction for the unperformed part. As such B though not A in the above illustration may have 50 bighas of land for half the stipulated consideration.

12. Section 15, Specific Relief Act, 1877.

13. *Mortlock v. Buller*, (1804) 10 Ves. 292, 315-316.

13a. Section 12 (3), Specific Relief Act, 1963.

The amendment, it is submitted, is repugnant to the very foundation for partial enforcement of contracts explained above, viz. in equity of remodelling contracts which the parties by agreement are alone competent to do. The remark of the Law Commission that the old provision was inequitable was, it is submitted, made without the root of the principle.

It is important to note that the following two classes of cases do not fall within and are not affected by the rule discussed above and need be kept and considered separately :

- (x) Where a contract consists of several parts which are separate from and independent of one another, and some of which cannot or ought not to be performed, such part or parts alone as can and ought to be performed, may alone be specifically enforced.<sup>14</sup> Such a contract though nominally one, contains, in fact, several contracts and when the Court enforces what is apparently a part, it really enforces an entire and a complete contract.

So where a building agreement provided that the lessor should grant leases piecemeal to the builder upon the completion of the building on the several plots, and the conditions as to building on one plot had been fulfilled, the Court enforced the agreement to grant a lease of that plot even though the Court could not specifically enforce the agreement to build on the other and the unbuilt-on plots.<sup>15</sup>

What is relevant and necessary in such cases is that the contract in question must be distinct and clearly severable from the rest or others and it would not matter whether other contracts are incapable of enforcement either because of illegality or of incapacity or any other like reason. The question whether a contract is divisible or indivisible is one of construction, depending on the nature and terms of each individual contract.

In *Graham v. Krishna*,<sup>16</sup> there was an agreement to sell two plots of land one belonging to the vendor and the other to his wife and the vendor failed to make out a title to the plot belonging to his wife. The consideration for the contract was a lump sum without there being any provision as to the relative values of the two plots and it was provided that in case the vendor failed to make out a marketable title, he should refund the purchaser's deposit. The Privy Council, reversing the decision of the Calcutta High Court in this case, held that both plots were dealt with together as a whole and there was nothing by which to separate them or to place one on a footing independent of the other. It was accordingly held that the specific performance of the part, i. e. of one plot only cannot be granted. The Court cannot force upon the parties a contract which in substance they have not already made for themselves.

It is well settled that a plaintiff who seeks specific performance must, in his turn, perform all the terms of contract which he expressly or by implication ought to have performed at the date of the action. Where a condition or essential term ought to have been performed by the plaintiff at the date of suit, the court does not accept his undertaking to perform in lieu of performance but will dismiss the claim.<sup>17a</sup>

- (y) The other class of cases which must be distinguished from contracts which cannot be specifically enforced in their entirety

14. Section 12 (4), Specific Relief Act, 1963.

15. *Wilkinson v. Clements*, (1872) 8 Ch. App. 96.

16. A. I. R. 1925 P. C. 46.

16a. *Pudi Lazarus v. Rev. Johnson Edward*, A. I. R. 1976 A. P. 243.

are those where at the time it was made, the contract was capable of being enforced in its entirety but subsequently by accident or otherwise, the whole or a portion of the subject-matter, though existing at the date of the contract ceases to exist at the time of the performance. The obligations of the parties are not affected and the purchaser or lessee is liable to pay the entire consideration agreed upon and the contract cannot be reformed or avoided.

This was provided for under Section 13 of the Specific Relief Act, 1877<sup>17</sup> which has been repealed by the Act of 193 and provided for by Explanation to Section 12 so as to assimilate such cases in the law of part performance of contracts discussed above.

**(B) Contracts the terms of which are different from those agreed or appearing to have been agreed upon.**

The expression *specific performance with a variation* is generally used in relation to such contracts alone. The law on the subject may be stated under the following heads :

- (1) Where the contract, as it stands and of which specific performance is being sought, does not correctly or fully represent the actual terms of agreement between the parties, or the contract as framed does not fulfil or attain the desired object of the parties either factually or legally, the question is whether the contract can be reformed so as to bring it into conformity with the actual agreement and whether specific performance, at the time, may be given of the actual agreement between the parties.

A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B seeks to prove that an adjoining yard was intended or meant by both the parties to be included in the dwelling-house, though it does not expressly appear from the writing. Two questions arise in such cases. Firstly, whether it is open to B to set up such a variation and, if so, under what circumstances ? Secondly, whether specific performance may be granted of the contract with such variation.

The first of these is really a question of the rectification of a contract and may be left for consideration when we come to that subject.<sup>18</sup> It may suffice to state here that it is permissible to either party to show that the contract actually made and subsisting between the parties is different from that shown by the writing or set up by the opposite party. The correct view of the action in such cases is that the new is not substituted for the old but the old is regarded as never having existed. Parol evidence is, as a general rule, not admissible to contradict or vary a written contract. In the discretionary jurisdiction of equity, however, a party to a contract or instrument is allowed to prove by means of parol evidence that owing to fraud or mistake the written contract does not completely express the terms agreed upon by the parties. Section 92 of the Indian Evidence Act, 1872 makes a provision to this effect by adding a specific illustration<sup>19</sup> on the point which says : "A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed."

On the second question, viz. whether equity can in one and the same

17. See *supra*.

18. See Chap. XXXV *infra*.

19. Illustration (e) of Section 92.



action rectify and specifically enforce a contract, it may be mentioned that formerly it used to be thought that both these reliefs cannot be combined in one action but it was held in *Cradock Bros. v. Hunt*<sup>20</sup> that it was permissible for the parties to do so. In England, this procedure seems to follow from Section 43 of the Judicature Act, 1925 which requires the Court to grant to the parties in one action all the reliefs to which they are entitled. In India it is allowed by Section 18 of the Specific Relief Act, 1963. The Court has, in such cases, a discretion either to dismiss the suit or grant specific performance with such variation as may be established.

- (ii) The second class of cases wherein specific performance may be sought with a variation are where the parties have subsequent to the contract varied its terms. This is a simple case. The variation really amounts to a rescission of the old and the making of a new contract, and it is the latter of which specific performance is sought.

A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tentable repair. The house turns out to be not worth repairing ; so with B's consent, A pulls it down and erects a new house in its place ; B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

It may be added that such a variation may be oral or written, but if the original contract was required by statute to be evidenced by writing, the same statutory requirement will exclude oral evidence of the variation, though there is nothing to prevent the proof of the rescission of the original contract by a subsequent oral contract.

The third class of cases where contractual obligations between the parties may be varied are those where it is a continuing or running contract and is based or founded on the supposition of the continued existence of certain facts or circumstances which in course of time cease to exist or have materially changed. Such contracts are capable of being reformed, varied or even annulled on the principle that if the parties knew or had adverted to such a contingency they would have modified the terms of their agreement.<sup>21</sup> Thus where a painter, for instance, is employed to paint a picture and he is struck blind, the performance of the contract may be excused. Similarly, where certain disputes regarding claim to a talukdari were settled by a compromise according to which maintenance allowance were fixed and given to certain persons but subsequently the profits of Taluka diminished considerably owing to adverse circumstances, it was held<sup>22</sup> that the amount of the maintenance settled should be reduced proportionately on the principles of justice, equity and good conscience.

The aforesaid principle does not, however, apply where the contract is positive and absolute and not founded on or subject to any condition of that nature in which case the contractor must perform it or pay damages for non-performance although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.<sup>23</sup>

It would, indeed, depend on and must be determined by the nature and terms of each contract whether it comes under one or the other of these two

20. (1923) 2 Ch. 136.

21. *Taylor v. Caldwell*, (1863) 3 B & S 826 ; *Tamplin Steamship Co. v. Anglo-Mexican Petroleum*, (1916) 2 A. C. 397.

22. *Raja Ram Pal Singh v. Surendra Bikram*, A. I. R. 1937 Oudh 82.

23. *Hall v. Wright*, E. B. & E. 746.

classes, "In applying this rule it is", observed Earl Loreburn, "manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree".<sup>24</sup>

### CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED<sup>25</sup>

As explained earlier, the general principle regulating the grant of specific performance of contracts is the inadequacy of the common law relief of damages or pecuniary compensation. This leads to the negative rule that specific performance will not be granted if pecuniary relief is possible and would be adequate. In the absence of any other consideration or factor, it would have been enough to conclude the enquiry. There were, however, other difficulties or considerations, on account of which the Court of Chancery declined to grant specific performance even though the contract was one of which, on general principles, specific performance should have been decreed. All such cases may be placed and considered under the following heads :

(1) **Contracts which are not valid at law.**—The fundamental rule is that equity will enforce specific performance of only such contracts which are valid at law and provable in Courts of law.

Section 9 of the Specific Relief Act, 1963, now lays down the law to this effect in general and comprehensive terms by providing that where any relief is claimed in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. On account of the provisions so made, Section 4 (a) providing that no relief shall be available in respect of any agreement which is not a contract, sub-sections (a) and (b) of Section 21 providing respectively that no specific performance shall be enforced in case of a contract by or on behalf of public companies which is in excess of their powers and of a contract a material part of the subject-matter of which supposed by both parties to exist has before it has been made ceased to exist and similar other provisions under the Act of 1877 have been omitted from the new Act. Section 21 (e) of the old Act—bar against specific performance of a contract made by trustees in excess of their powers or in breach of their trust—could be dropped likewise but it has been retained under Section 11 (2) of the new Act.

Diverse questions arising in this connection, viz. capacity or consent of the parties to a contract, consideration for the contract, the legality of the object or subject of a contract, the formalities as to writing, etc. in a particular contract are all peculiar to the Law of Contract and must be left for a treatise on that subject. For the purposes of this book it may be sufficient to add an example or two showing the nature of the point under consideration.

Where the averment to the effect that the plaintiff has all along been ready and willing to perform his part of the contract, is lacking in the plaint, the plaintiff is not entitled to any decree for specific performance notwithstanding the fact that no breach of contract was committed by the plaintiff and that it was the defendant who tried to evade execution of the contract by hook or by crook.<sup>25a</sup>

24. *Tamplin Steamship Co. v. Anglo-Mexican Petroleum*, (1916) 2 A. C. 397, 403.

25. Section 14, Specific Relief Act, 1963

25a. *Sankatha Pd. v. Abdul Aziz Khan*, A. I. R. 1976 All. 95.

The court will not, for instance, grant specific performance of a contract entered into by a minor even where the minor had made a false representation as to his age.<sup>26</sup> As stated by Lord Sumner, "It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through."<sup>27</sup>

The case of *Wilmot v. Barber*<sup>28</sup> may be cited to illustrate the point that specific performance of a contract will not be decreed where to do so would necessitate a breach of trust or a prior contract with a third person. Here, the defendant, a tenant holding under a covenant not to assign or underlet the land without his landlord's consent, agreed to underlet to the plaintiff a part of the land with the option of purchasing the whole within five years. The landlord refused his consent. The plaintiff brought a suit against the defendant and his landlord for the specific performance of the contract and it was held that the suit could not be decreed as it involves the breach of a covenant. The judgment was based on the ground of hardship also.

Defective contracts in so far as relevant to or falling within the scope of equity are covered under Mistake, Misrepresentation *etc.* in Chapter XVI and the equitable reliefs available in such cases together with their requisites, *etc.* would be taken up under Rectification, Rescission, *etc.* in Chapter XXXV. For the purposes of specific performance of contracts it should suffice to state that a contract which is not valid or enforceable at law cannot be specifically enforced. The underlying principle is that specific performance fell within the concurrent jurisdiction of equity and, therefore, equitable relief could be granted only when the contract is one for which the legal relief of damages would have been available. The only notable and indispensable reference to be made on the point is that of the equitable doctrine of part-performance.

*The equitable doctrine of part-performance*, as explained earlier,<sup>29</sup> comes as an exception to the general rule that if a contract otherwise valid has not been made in due compliance with the requisite formalities as to writing or registration *etc.* and is, for that reason, not enforceable at law, will not be recognised or remedied in a Court of equity. So contracts coming within the doctrine of part performance may, notwithstanding the defects or objections to which they are subject at law, be specifically enforced in equity.

The underlying principle, as stated by Lord Cranworth, L. C. in *Caton v. Caton*,<sup>30</sup> is this: "When one of the two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land and expending money in building or other like acts, there would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend money."

Pomeroy explains the doctrine as follows :

"The ground of jurisdiction is equitable fraud ; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defence. If the defendant knowingly permits the plaintiff to do acts in part-performance of the verbal agreement, which change the relations of the parties and prevent a restoration of their former condition, it would be a virtual fraud for

26. *Ajudhia Prasad v. Chandan Lal*, A. I. R. 1937 All. 610.

27. *Lesley Ltd. v. Shiell*, (1914) 3 K. B. 607 ; this protection, however, may be used only as a shield and not as a sword—*Jennings v. Rundill*, (1799) 8 T. R. 335, 337.

28. (1880) L. R. 15 Ch. D. 96.

29. See

30. (1866) L. R. 1 Ch. 137, 148.

the defendant to interpose the statute as a defence and thus to secure for himself the benefit of the acts of part-performance, while the plaintiff would be left not only without adequate remedy at law but also liable for damages as a trespasser."<sup>31</sup>

The doctrine has now received statutory authority in England under Section 40 of the Law of Property Act, 1925, which, while re-enacting Section 4 of the Statute of Frauds, 1677 with regard to the requirements as to writing and signature for creating any interest in land, expressly provides that the section "does not affect the law relating to part-performance".

In order that the doctrine of part-performance may apply and specific performance may be granted it is necessary, in the first place, that the agreement must be one which is otherwise valid. In the second place, the contract must be one of which specific performance may be decreed. In the third place, the act of part-performance must have been done by the plaintiff, part-performance by the defendant will not take the case out of the statute.

Mutation of the name of the mortgagee in possession of the property as owner in the municipal register as provided for in the agreement of sale would be an act in furtherance of the contract so as to attract and fulfil the requirement as to the benefit of the doctrine of part-performance. The covenant in the agreement of sale constituting the mortgagee as owner and empowering him to get his name mutated as owner has only one meaning namely that such mutation should be made in order to display the transformation of possession as mortgagee into possession as owner. No further indication to that effect in the agreement of sale is necessary for restraining the claim for the benefit or result of part-performance.<sup>31a</sup>

In India, the equitable doctrine as to part-performance has been laid down under Section 53-A of the Transfer of Property Act, 1882, which was added by the Transfer of Property Amending Act (XX) of 1929. The doctrine was applied to leases by Section 27-A of the Specific Relief Act, 1877, which was added by the Transfer of Property (Amendment) Supplementary Act (XXI) of 1929. Formerly, it was held by the Calcutta High Court in *Sanjib Chandra v. Santosh Kumar*,<sup>32</sup> that where there was a written contract to lease which had not been registered, specific performance could not be granted even though the tenant had been put in possession in part-performance of the contract. The same view was taken by the Madras High Court<sup>33</sup> as well. Section 27-A of the Specific Relief Act, 1877, was accordingly enacted to give relief to the lessee in such cases and to supersede the earlier decisions to the contrary. This section applied only to a contract for lease of an immovable property which was in writing and signed by both the parties but had not, though required by law, been registered and enabled the parties to obtain specific performance of the contract, if—

- (a) where the lessor had, if he was the plaintiff, delivered possession of the property to the lessee in part-performance of the contract, and
- (b) where the lessee, if he was the plaintiff, had taken or, being already in possession, continued in possession of the property in part-performance of the contract and had done some act in furtherance of the contract.

31. Pomeroy's Equity Jurisprudence, 5th ed., Vol. IV.  
 31a. B Murlidhar v. Soudagar, A. I. R. 1970 Mys. 203.  
 32. (1921) 49 Cal. 507.  
 33. Narain v. Muthia, 35 Mad. 63.

It may be noted that Section 53-A of the Transfer of Property Act, 1882, is extensive enough to cover cases provided for through Section 27-A of the Specific Relief Act, 1877, the only material distinction between the two being that in the former the benefit or protection of part-performance is available only in defence to any action by the plaintiff while in the latter it was an active equity enabling the plaintiff to sue for specific performance of the contract on the strength of part performance. In the earlier editions of this book it was submitted that if this could have been the object or in contemplation of the framers of the amendment it was difficult to see why it should have been confined to leases alone and not made applicable to contract for sale *etc.* One of the ways in which the criticism could be met was to extend the principle of Section 27-A to sales also and the other was to abolish the principle of Section 27-A and the Legislature has preferred the latter by deleting the provisions of Section 27-A from the Specific Relief Act, 1963, in contemplation of suitable amendment in the Registration Act. The basic incongruity does not seem to have been noticed and it seems doubtful if it would be admitted to in the proposed legislature.

It may be mentioned that part-performance as an equitable doctrine comes into vague when there is a particular kind of defect or deficiency in the contract, and conditions being fulfilled cures that defect or deficiency.

It will not, for instance, apply in the case of a memorandum which simply records the fact of taking possession by the parties concerned in pursuance of an agreement for exchange of their respective properties in Pakistan and India. The memorandum could not be treated either as a contract of exchange or as a deed of exchange. The provisions of Section 53-A of T. P. A. was not attracted and the defendant could not rely on the same for protecting his possession of the property in question or perfecting the title to the same.<sup>33a</sup>

Similar on principles but altogether different in scope are other acts done or losses suffered in furtherance of a contract. This is neither associated with nor a cure for any defect in the contract but is an important consideration in favour of the exercise of the Court's discretion for specific performance. Equity will more readily decree specific performance of contract partly performed and English Courts have gone as to say<sup>34</sup> that where there has been part-performance the Court is bound to try to find some meaning in an otherwise vague contract, and not to be content to refuse a decree for specific performance on the ground of that vagueness.

Similarly, Section 20(3) of the Specific Relief Act, 1963, re-enacting Section 22 III of the old Act provides that the Courts may properly exercise a discretion to decree specific performance where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

In *Bikram Kishore v. Benudhar Jena*<sup>34a</sup> the plaintiff sued for specific performance of a contract to transfer certain shares in a company. Transfer of shares was subject to the decision of the Board of Directors and subject to the terms of the Memorandum Association which provided that no share could be transferred without the sanction of the Government. It was held that the relief to be granted in a suit for specific performance of a contract was a discretionary one and under the circumstances a declaration could not be given to the plaintiff of his right of future transfer of shares.

33a. *Krishna Sardar v. Sindhu Bala*, A. I. R. 1970 Cal. 444.

34. *Modern Equity*, by H. G. Hanbury, 2nd ed., p. 571.

34a. A. I. R. 1976 Ori. 4.

(2) **Contracts in which Legal Remedy Adequate.**—As a general rule, where damages at law would afford adequate relief for the breach of contract, equity will not insist on the contract being specifically enforced.

This is the reverse of the reason which serves as the foundation of the jurisdiction to decree specific performance and has been explained already. An illustration or two may alone be given here.

A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1,000 per chest. The contract being in respect of a property which is ordinarily and easily available and saleable in the market will not be specifically enforced because A or B may each be adequately compensated for by being awarded such damages which may be caused to them by selling to or purchasing from another the subject-matter of the contract. On the same principle no specific performance can be granted of a contract for the sale of a Government stock or of a contract to lend money or to pay a loan by instalments.<sup>35</sup>

The law will not invariably apply to contracts for the purchase of shares in a company and specific performance may be decreed, in cases where from the nature of the company and the limited market for its shares, damages would not be adequate remedy for non-performance of the contract.<sup>36</sup>

Reference need here be made to the equitable rule contained in Section 23 of the Specific Relief Act, 1963, that liquidation of damages is in itself no bar to specific performance unless the provision for payment of damages may be construed as an alternative contract sufficient to discharge the promisor.<sup>36a</sup> Accordingly, if the contract is one of which specific performance may be given, it will not be refused simply because the parties have named a sum which would be payable in case of breach of contract. So where a contract between A and B provides for the lease of A's house for 7 years and in case of default for Rs. 500 as damages, the Court may still enforce specific performance of the contract.

The general rule of equity is that if a thing be agreed upon to be done, the very thing must be done although there is penalty annexed to its non-performance. In the earlier conditions of this book it was here added that "the Court of equity looks to the substance and not the form of the agreement and generally leans against the construction that the liquidated damage is of an alternative nature. The rule does not apply if the contract expressly gives an option to the party either to perform the contract or not to perform it and pay damages."

That rule has now been incorporated in Section 23 (1) of the Specific Relief Act, 1963, which replaces Section 20 of the old Act with this modification that such intention need not be express and may suffice if it can be gathered from the terms of the contract and other attending circumstances.

The principle of this section, it may be mentioned, applies to injunctions as well. So where the defendant agreed to serve a Railway company exclusively for four years under a penalty of £ 100, he was restrained by injunction from undertaking service elsewhere during that period.<sup>37</sup>

(3) **Contracts involving Personal Service.**—A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or violation of the parties or otherwise from its nature is such,

35. *Hukum Singh v. Khunni Lal*, (1911) 8 A. L. J. 1282.

36. *Bank of India v. Jamssetji*, A. I. R. 1950 P. C. 90, see, however, Section 14 (3) (b) (ii) of Specific Relief Act, 1963.

36a. *Jaswant Singh v. Iswar Singh*, A. I. R. 1959 R. 88.

37. *Madras Rly. Co. v. Rust*, (1890) 14 Mad. 18.

that the Court cannot enforce its material terms, will not be specifically enforced.<sup>37a</sup> Thus in *Lumley v. Wagner*,<sup>38</sup> a lady agreed with a theatrical manager to sing at his theatre for a definite period, but the Court refused to order her to sing.

Where, whenever the contract is partly dependent upon personal violation and partly not so depended and the former has already been performed, it would not bar and cannot be pleaded against an action for specific performance of the latter part.<sup>38a</sup>

There is no doubt that the remedy at law of damages for the breach of such contracts might be wholly inadequate since no amount of money recovered by the plaintiff might enable him to obtain the same or similar services elsewhere or by employing any other person. The ground for refusing specific performance in such cases is, however, the inability or difficulty of the Court in executing its decrees. This is the basis of the general rule laid down by Professor Langdell: "If a contract consists in giving (*dando*) equity can enforce a specific reparation of a breach of it; if it consists in doing (*faciendo*) it cannot."<sup>39</sup> "The effects of awarding specific performance in such cases would", as expressed by Dr. Hanbury, "be highly undesirable from two points of view; they would involve continual supervision by the Court, and also harsh and unconscionable compulsion of the contract into a state of contractual slavery, nonetheless real because salaried."<sup>40</sup>

The chief classes of contracts falling under this head are contracts for personal service or for writing a book or painting a picture, a contract to marry, *etc.*

With regard to contracts for personal service, it may be noticed that the bar will not apply where the question is confined to the validity or legality of discharge or appointment. Thus a decree which merely prevents the dismissal of managing agents or termination of their appointment at the instance of the majority but in violation of the articles of association, does not violate the prohibition. As between the company and the managing agents it has not the effect of enforcing a contract of personal service.<sup>41</sup>

The law as stated above holds the field and has been affirmed in a number of recent cases—including those decided by the Supreme Court—on the point. The general against enforcement of the contract of personal service is simple and involves no difficulty in comprehending and applying the same. The difficulty rests in defining the exception to the general rule and circumscribing the limits within which it operates. It should from that point of view suffice to refer to the decision of the Supreme Court in *U. P. S. W. Corpn., Lucknow v. C. K. Tyagi* 1970 S. C. 1244 wherein the law has been enunciated after a review of the relevant case law on the point—both English and Indian.

The English law on the point as summarised by the Supreme Court runs thus: "From a review of the English Decisions, referred to above, the position is as follows: The law relating to master and servant is clear. A contract of personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of contract of service by his master and say that the contract has never been terminated. The remedy of the employee is claim for damages for wrongful dismissal or for

37a. S. 14 (1) (b) of Specific Relief Act, 1963, reproducing S. 21(b) of the old Act.

38. (1852) 1 De G. M. & G. 604.

38a. *Moti Ram v. Khvali Ram*, A. I. R. 1967 All. 484.

39. See *Modern Equity* by H. G. Hanbury, 4th ed., p. 574.

40. *Callhanji v. Narsi*, (1884) 18 Bom 702.

41. *Ram Kissendas v. Satyacharan*, A. I. R. 1950 P. C. 81.

breach of contract. That is the normal rule and that was applied in *Barbari* case 1958-1 A. U. E. R. 322 and *Francis* case, 1962-3 All. E. R. 633. But when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services of such an employee the latter will get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant. This was the position in *Vines* case, 1956-3 All. E. R. 939". at p. 1251

The Indian Law on the point was stated as follows :

"From the two decisions of the court (*Dr. Dutt's* case A. I. R. 1948 S. C. 1050 and *Tewari's* case A. I. R. 1964 S. C. 1080).....the position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognised exceptions to this rule and they are : To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Art. 311 (2). Reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals (3) Statutory body when it has acted in breach of mandatory obligation imposed by a statute". at p. 1253.

The case did come under either of the first two categories and was discussed in relation to the third category of cases on the basis of the current findings of all the courts below affirmed by the Supreme Court as well that the dismissal of the plaintiff from the service of the defendant corporation was in violation of the provisions of Regulation 16 (3) framed by the Corporation under section 54 of the Agricultural Produce (Development and Warehousing), Corporations Act, 1956 i.e. of violation of the presented procedure and want of due opportunity of defence to the employee.

It was held that the case did not even then come or be disposed of under the third category. Distinguishing the two earlier cases on the point (*Life Insurance Corporation of India v. Sunil Kumar Mukerjee*, A. I. R. 1964 S. C. 847 and *State of Uttar Pradesh v. Babu Ram Upadhyaya*, A. I. R. 1961 S. C. 751) it was observed, "The Act does not guarantee any statutory status to the respondent (plaintiff) nor does it impose any obligation on the appellant in such matters. As to whether the rules framed under section 52 deal with any such matters does not arise for consideration in this case as the respondent has not placed any reliance on the rules and he has rested his case only on regulation 16 (3). It is not disputed in that, in this case, that the authority who can pass the order of dismissal has passed the same. Under these circumstances a violation of regulation 16 (3) as alleged and established in this case, can only result in the order of dismissal being held to be wrongful and in consequence making the appellant liable for damages. But the said order cannot be held to be one which has not terminated the service, albeit wrongfully or which entitles the respondent to ignore it and ask for being treated as still in service. We are not concerned with the question of damages, because no such claim has been made by the respondent in these proceedings.

"In this view, the judgment and the decree of the High Court, in so far as they declare that the order dated March 10, 1964 is null and void and that the respondent continues to be in the service of the appellant, are set aside and the appeal allowed to that extent." p. 1255.

(4) **Contracts involving Continuous Supervision of the Court.**—This class is closely connected with the previous one and there are many cases which may be placed under either or both these categories. Some of the contracts generally placed under this head are : A contract for the working of quarries or



coal mines, a contract to maintain an inn or to manage and operate a rail road, a contract to keep a farm well stocked with horses and cattle, a contract to support a person as a member of one's house hold or to furnish news to a publishing company for a number of years. The principal ground for refusing specific performance in such cases seems to be that it would not be expedient, even if it be possible, for the Court to devote itself in enforcing such contracts. Dr. Banerji says, "...if the Court were to make what purported to be a final order for specific performance in such cases, such order would not be the end of litigation, but, on the contrary, its fruitful and continuous source."<sup>42</sup>

In the earlier edition of this book it was added that "There is an important difference between the English and Indian law on the point. Section 21 (g) of the Specific Relief Act, 1877 has fixed an arbitrary time limit and specific performance of a contract cannot be granted for a period longer than 3 years. English law, on the other hand, has not laid down a fixed period for this purpose and the test in each case is one of reasonableness and practicability. With regard to the Indian law on the point, it should be noted :—

- (i) that the continuous duty in question must be of a kind of which specific performance may be granted. If it is otherwise specific performance of the contract, though for less than three years, will be refused ; and
- (ii) that if the contract is for more than three years and of a kind of which specific performance would have been given if it were for three or less than three years, specific performance cannot be granted even for three years for the contract cannot be split up into two parts."

The criticism has been noticed by the Legislature and the anomaly has now been removed by Section 14 (1) (d) of the Specific Relief Act, 1963 which substitutes the expression, "extending over a longer period than three years from its date" of Section 21 (g) of the old Act by "which the court cannot supervise" after 'continuous duty'.

(5) **Contracts with Uncertain Terms.**—Where the contract is uncertain *i. e.*, vague and indefinite as to its subject-matter, parties, price or other terms, it cannot and will not be specifically enforced. The reason for this obviously is the inability of the Court to make any order as to specific performance in such cases.

A, the owner of a refreshment-room, contracts with B to give him accommodation there for the sale of his goods and to furnish him with necessary appliances. The amount and nature of the accommodation and appliances being undefined, the contract will not be specifically enforced.

Evidently price is an essential ingredient of all sales and where it is neither ascertained nor rendered ascertainable in terms, express or implied, of the contract, the contract is void for incompleteness and cannot be specifically enforced. So where the price agreed was Rs. 500/- more than any other purchaser would give, or such sum as the parties may subsequently agree upon any sum or such sum as may be determined by X into.....to do it, the contract was and remains imperfect and cannot be enforced. The Court has never gone the length of compelling a party to buy or sell the subject his agreement at a price that he has never fixed nor has been or can be fixed in any mode agreed by them. These cases must be distinguished from those where the contract provide or implied an intention for a fair or reasonable market price for sale which is good on the strength of the principle, "that is certain which

42. The Law of Specific Relief in British India, 1909 ed., p. 210.

can be made certain" and is enforceable on the basis of a reasonable price as ascertained by the Court.

On contracts which are incomplete as to their consideration and the question if, when and how the same may be good, reference may appropriately be made to the decision in *Nair Service Society v. R. M. Polar*, A. I. R. 1966 Ker. 311 which alongwith the authorities relied on leads to the following statement of the law in reference but limited to sales.

(6) **Contracts to Build or Repair.**—While it is established that the specific performance of a contract to build or repair will not, as a general rule, be granted, it is difficult<sup>43</sup> to say whether it falls or should be placed under the fifth, fourth or the second<sup>44</sup> head and according to the reasonings advanced in *Wheatley v. Westminster Brymbo Coal Co.*,<sup>45</sup> it comes under all these three categories. It need, therefore, be considered under a separate head.

It is, however, important to note that the general rule against specific performance of a contract to build or repair is subject to an exception laid down in the leading case of *Wolver Hampton Corporation v. Emmons*.<sup>46</sup> The plaintiffs, an urban sanitary authority, in pursuance of a scheme of street improvement, sold and conveyed a plot of land abutting on a street to the defendant who agreed to erect buildings thereon. The number and plan of the buildings were not originally laid down but by a subsequent agreement the defendant agreed to erect eight houses to a certain plan submitted by the defendant and approved by the plaintiff. The defendant failed to perform the contract and accordingly the plaintiff brought an action for specific performance of the contract.

It was held that the terms regarding the erection of the buildings were definite and the plaintiffs could not be adequately compensated for the breach of the contract. Specific performance was accordingly ordered.

Under English law the question has mostly arisen in cases of a railway company acquiring land under an agreement to build a station or railway siding. These cases lead to the rule "that the Court will order specific performance of an agreement to build if—

- "(i) the building work is defined by the contract ;
- "(ii) the plaintiff has a substantial interest in the performance of the contract of such a nature that damages would not compensate him for the defendant's failure to build ; and
- "(iii) the defendant is in possession of the land, so that the plaintiff cannot employ another person to build without committing trespass."<sup>47</sup>

The Specific Relief Act, 1963, under Section 14 (3) (c) incorporates the rule reproduced above and extends its application to the execution of any other work on land.<sup>47a</sup>

(7) **Contracts for Revocable Interests.**—The Court will not grant specific performance of a contract which is in its nature revocable or which purports

43. See Snell's Principles of Equity, 23rd ed., p. 539.

44. Because some one may always be found to do the work and so damages would be appropriate relief.

45. (1869) L. R. 9 Eq 538 ; See Modern Equity by H. G. Hanbury, 4th ed., p. 573.

46. (1901) 1 K. B. 515.

47. Snell's Principles of Equity, 23rd ed., p. 539.

47a. Specific Relief Act, 1963 uses this word 'determinable' on the ground, as stated by Law Commission, of its being more accurate.

to confer rights or creates interests which may be extinguished at the pleasure of the defendant.

A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically enforced, for, if it were, either A or B might at once dissolve the partnership.<sup>48</sup>

Other examples of contracts of such a nature are agreements for a tenancy at will or agreements to advance loan of money. The underlying principle in such cases is that of inutility or as it is generally expressed "equity, like nature, does nothing in vain".

Section 14 (3) (b) of the new Act in providing for specific performance of a formal deed of partnership, the parties having commenced to carry on the business of the partnership and for the purchase of a share<sup>48a</sup> of a partner in a firm makes a departure from the principle enunciated above unless by judicial interpretation the provision is restricted to cases of partnership of a fixed duration. Seeking to codify the principle laid down by the Privy Council in *Jewan Lal v. Nilmani*,<sup>48b</sup> the section aforesaid provides for specific performance for a mortgage or other security in consideration of loan advanced.

(8) **Contracts for Arbitration.**—A contract to refer a controversy to arbitration shall not be specifically enforced except in so far as it is permissible in England under the Arbitration Act, 1889 or in India under the Arbitration Act, 1940. But the existence of such a contract bars a suit in respect of the subjects agreed to be so referred. The bar applies not only to the institution of a suit where there is a pre-existing agreement for reference to an arbitration but also or equally to the further prosecution of the suit where the agreement to refer is made after the institution of the suit.<sup>49</sup> To set up this bar it is, however, necessary to establish that the plaintiff had refused to refer the controversy to arbitration; such refusal not being inferable from the mere filing of the plaint.<sup>50</sup>

The general equitable doctrine is not to enforce an agreement to refer disputes to arbitration because it is against public policy to exclude from the appropriate judicial tribunals of the state any person who in the ordinary course of things would have a right to sue there. The tendency now is not to discourage arbitration. The object of the bar to a suit is to achieve the objective indirectly by imposing a kind of moral pressure to prevent people who have entered into contracts to refer to arbitration from breaking it wilfully and capriciously.

(9) **Contracts lacking Mutuality.**—The principle of mutuality in relation to specific performance of contracts may, *assuming it to be so applicable*, be stated as follows: Specific performance of a contract cannot be granted unless it can be claimed by or granted to both the parties to the contract. This is illustrated by a contract by or on behalf of a minor which cannot be specifically enforced for him since it cannot be enforced against him or a contract for personal service to be rendered by A to B which cannot be specifically enforced by A since it cannot be enforced at the instance of B. Similarly,

48. *Pravudayal v. Ram Kumar*, A. I. R. 1956 Cal. 41.

48a. See, however, *Bank of India v. Jarnset*, A. I. R. 1950 P. C. 50, shares in a company.

48b. A. I. R. 1923 P. C. 80.

49. *Shib Lal v. Hira Lal*, (1888) A. W. N. 133.

50. *Kumud Chunder Dass v. Chunder Kant*, 5 Cal. 498; *Ralli v. Walaiti Ram*, 80 P. R. 1906.

if the contract is one of which specific performance should be granted to one party it will, to satisfy the principle of mutuality, be granted also at the instance of the other party, e.g. a contract for the sale or lease of land. There are, however, cases wherein specific performance is granted although the obligation or relief is not mutual or available to both the parties. Thus, as a result of the statute of Frauds, A may obtain against B the specific performance of a contract which has been signed by B but not A, although A is not bound by the contract and specific performance cannot be granted at the instance of B.

There is a good deal of controversy on the subject and it is difficult to say whether and how far the principle of mutuality may be considered to be a requisite for the relief of specific performance of contracts.

### English Law.

The authorities on English law are divided or perhaps evenly balanced. The doctrine supposed to have been invented by Lord Redesdale<sup>51</sup> and formulated by Fry<sup>52</sup> has been supported, among others, by Anson<sup>53</sup> and 'Cheshire and Fifoot'<sup>54</sup>. It has, on the other hand, been repudiated, among others, by Ashburner,<sup>55</sup> Maitland<sup>56</sup> and Ames.<sup>57</sup>

Lord Redesdale observed: "This would not be equity that a party not bound by the agreement itself, should be permitted, at his option, and when he finds it to his advantage to do so to compel the other party to perform, when, if the advantage were the other way, he could not himself be coerced to performance on his part."

Fry lays down the rule as follows: "A contract to be specifically enforceable by the Court must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being specifically enforced against one party, the party is equally incapable of enforcing it against the other."

Ashburner's comment on the subject is as follows: "The doctrine of want of mutuality, as laid down by Lord Justice Fry, appears to be an unfortunate invention of Lord Redesdale; and although it has often been spoken of with respect, it does not appear to form the *ratio decidendi* of any line of cases."

The subject may be wound up in the following words of Dr. Hanbury:

".....in England Fry's rule might say, with Lucio, 'I am a sort of burr, I shall stick, for it is apt to make repeated appearance in the dicta of judges. But it is dangerous in that, though it will explain some cases, there are more which it cannot explain. Though there is hardly such a thing known to English law as a rule without exceptions, yet a rule which is overloaded with exceptions may perhaps be said to lose its claim to be a rule.'"<sup>58</sup>

51. *Lawrenson v. Butler*, (1802) 1 S. Ch. & Lef. 13, 18.

52. *Specific Performance*, 6th ed., p. 219.

53. *Contracts*, 19th ed., pp. 125, 378.

54. *Law of Contracts*, p. 40.

55. *Principles of Equity*, 2nd ed., pp. 404, 405.

56. *Lectures on Equity*, p. 303.

57. *Lectures on Legal History*, p. 370.

58. *Modern Equity* by H. G. Hanbury, 4th ed., pp. 578-579.

• The learned editor of Pomeroy's Equity Jurisprudence sums up the position as follows :

"So numerous and so varied are the exceptions to this rule that it is at present of little force as a rule. It is held in many modern cases and in the view of the American Law Institute that the fact that the remedy of specific enforcement is not available to one party is not sufficient reason for refusing it to the other party. Mutuality of obligation is one thing and mutuality of remedy another."<sup>59</sup>

#### Indian Law.

In this earlier edition of this book the position was stated as follows :

"The subject is not free from difficulty or controversy in India as well. The Specific Relief Act, 1877, does not anywhere expressly repudiate the doctrine of mutuality. On the strength of the proceedings of the Legislative Council relating to this Act, the view has, however, been expressed<sup>60</sup> that it was not the intention of the Indian Legislature, when enacting the Specific Relief Act, to introduce this principle which was said to have found its place in English Courts of Equity rather from a desire for symmetry than from its inherent utility. The contrary view<sup>61</sup> is that the language used in respect of the last nine illustrations of clause (b) of Section 21 of the Act supports the position that the doctrine is part of the Indian law.

The judicial opinion on the point is equally inconsistent. The Calcutta High Court, following *Flight v. Bolland*,<sup>62</sup> applied the principle of mutuality and refused specific performance to a minor. The Madras High Court, on the contrary, held<sup>63</sup> that the doctrine of mutuality had no application in India. The doctrine of mutuality was referred to with approval by the Privy Council in *Sarwarjan v. Fakruddin Mohammed*.<sup>64</sup> It was said, "They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within competence of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract....."

The Specific Relief Act, 1963 clears the doubt and difficulty on the point by providing against the applicability of the doctrine of mutuality in India through Section 20 (4) which says "The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

#### DEFENCES TO AN ACTION FOR SPECIFIC PERFORMANCE<sup>65</sup>

Defence in law means a denial by the defendant of the truth or validity

59. Pomeroy's Equity Jurisprudence, 5th ed., Vol. IV, p. 1043.

60. Stoke's Anglo Indian Codes, Vol. I, p. 931 ; Collet on Specific Relief Act, p. 152.

61. See The Law of Specific Relief in British India by S. C. Banerji, p. 437, et seq.

62. (1828) 4 Russ. 299.

63. Krishnasami v. Sundarappayar, (1894) 18 Mad. 415.

64. (1912) 9 A. I. J. 26, 29.

65. The provisions of the Specific Relief Act, 1877 on the point are not grouped together specifically under such a head but are scattered over different titles which may be collected together under this head.

of the plaintiff's claim or complaint and includes anything that may be set up by him or would entitle him to demolish or defeat the plaintiff's case. In a suit for specific performance, therefore, it is open or given to him to say that the plaintiff is not a party to the contract and has even otherwise no right of action or that the contract is vitiated<sup>66</sup> by fraud, undue influence, mistake *etc.* or that the contract is one of which specific performance cannot be decreed either because damages would be appropriate or because it is for personal service or involves continuous engagements *etc.* All these matters have been considered already and do not, properly speaking, fall within the scope of the present enquiry which presupposes the existence of a contract which is valid in law and specifically enforceable in equity and comes in to play after these requisites for the specific performance of contracts. The various or remaining defences to an action for specific performance may be given under the following heads :

(1) **Want of or Defect in Title**<sup>67</sup>.—When an action for specific performance is brought by a vendor or lessor, it is a defence for the purchaser or lessee that the plaintiff cannot make a good title to the property in accordance with the contract. Thus where A agrees to sell his house to B free from all incumbrances and it turns out that the house is subject to incumbrances which has not or cannot be removed or cleared, B can successfully resist or avoid A's suit for the specific performance of the contract. There is nothing wrong on principle, or any difficulty in its application where the plaintiff has no title at all or when the defect in the title is clearly established and inconsistent with the bargain. Considerable difficulty, however, is involved in cases of doubtful titles. On principles this should serve as a valid defence because the defendant cannot be compelled to accept a doubtful title or, to use a more striking expression, the Court will not force a party to purchase a law suit.

A, being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A claims the land as heir of B who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. Z can successfully put this in defence of a suit for specific performance by A.

In order that the defence may not be abused by making frivolous attacks on title and may not introduce uncertainty in the fulfilment of agreement it is necessary that the doubt in the title must be substantial. The law on the point has been summed up by Maitland as follows: "The modern cases oblige us to say that the doubt which is to serve as the purchaser's defence must be a very serious doubt."<sup>68</sup> A more practical form of this requisite is that given by Dr. Hanbury<sup>69</sup> duly supported by other authorities, "if the purchaser wishes to escape from carrying out a completed contract to purchase a piece of land, he must show that the title is clouded with a very substantial doubt, such a doubt as renders subsequent litigation, if not morally certain, at least exceedingly probable."

The nature of the title which can be insisted upon by the purchaser or lessee in the case of a contract for the sale or lease of land depends usually upon the terms of the contract. But even if the title be sufficient and in strict conformity with the terms of the contract, the Court may yet exercise its

66. See Section 28 (b) and (c) of the Specific Relief Act, 1877 covered by Section 9 of the Act of 1963.

67. Section 17, Specific Relief Act, 1963.

68. Maitland's Equity, 1916 ed., pp. 312-313.

69. Modern Equity by H. G. Hanbury, 4th ed., p. 589.

discretion in refusing specific performance if the enforcement appears to be unreasonable on account of the existing doubt or deficiency in the title.

It must, however, be noted that it is incumbent on the purchaser to exercise his right of repudiation as soon as he knows of the defect in the vendor's title and may accordingly lose his defence by acquiescence or laches. A vendor whose title is bad at the date of the contract can nevertheless compel specific performance if the defect is cured before the purchaser has definitely repudiated the contract.<sup>70</sup>

Section 17 of the Specific Relief Act, 1963, lays down the Indian law on the point. It applies both to movable and immovable property and to sales and leases. On general principles it is in agreement with the English law and sub-section (b) provides for the defence based on a reasonable doubt as to title and nothing need be added on the point or said on this sub-section. The other sub-section (a) lays down that the contract will not be specifically enforced in favour of a vendor or lessor who, knowing himself not to have any title to the property, has contracted to sell or let the same.

In *Veera Raghviah v. M. China Veeriah*,<sup>71</sup> where the father and his sons were members of a joint family and the father entered into an agreement to sell the joint family property to X and the agreement was found to be a collusive transaction not binding on the sons, it was held that the specific performance cannot be decreed even as regards the father's share in the property.

Stokes expressed the view that the intention of the legislature in enacting sub-section (a) was to lay down a rule in accordance with the view apparently held by Knight Bruce, V. C., in *Adams v. Brooke*<sup>72</sup> and subsequent acquisition of title will not entitle the vendor to enforce specific performance even though the time fixed for completion has not passed.<sup>72a</sup> It has been also held by the Nagpur High Court in *Kisanlal v. Nandao*<sup>73</sup> that if the vendor knew that he had no title at the time of the agreement, he cannot get specific performance even if he can make out good title at the date of the suit. This is only an application of the general equitable defence of 'clean hands'. It may be noted that Section 13 (1) (a) of the Specific Relief Act, 1963, allows specific performance of contracts in such cases at the instance of the purchaser or lessee.

"Voluntary settlement", as explained in the Council while introducing the Bill, on the Specific Relief Act, 1877 "means a settlement for which no money was paid or for which no other valuable consideration, such as marriage, was given". Equity will not aid a volunteer and as such the person in whose favour such a settlement was made could not sue on or enforce the same. Courts of equity would not, however, allow the settlor himself to enforce specific performance of his contract the subject-matter of which had already been disposed of by him through a voluntary settlement. The provision for the law to this effect was made under Section 25 (c) of the Act of 1877. The underlying principle is the same, viz. necessity or absence of clean hands and a settlor has, accordingly, no equity to defeat the act which he has done himself. It may, however, be noted that the previous voluntary settlement of the subject-matter of the contract is no bar to a suit for specific performance by the other party if he is a *bona fide* purchaser for value without notice. As provided for by Section 24 (d) of the 1877 Act, specific performance of a

70. *Re Halles and Hutchinson's Contract*, (1902) 1 Ch. 233.

71. (1842) 1 Y. & C. Ch. 627, 630.

72. *Stoke's Anglo Indian Codes*, Vol. I, p. 697.

72a. A. I. R. 1975 A. P. 350.

73. A. I. R. 1943 Nag. 299.

contract could not be enforced at the instance of a person who had, at the time of his contract, notice of a pre-existing settlement, for value or voluntary, of the subject matter of his contract.

Thus, where A, out of natural love and affection, made a settlement of certain properties on his brothers and their issue and afterwards enters into a contract to sell those properties to B, A could not enforce specific performance of the contract against B. But B could enforce specific performance against A, if the contract was for value and B had no notice of the settlement.

The Specific Relief Act, 1963, repeals by omitting both these sub-sections relating to voluntary settlements. The ground of justification for this omission is stated to be change under English law on which it was based and settlements in India taking effect immediately.

(2) **Hardship or Unfair Advantage**<sup>74</sup>.—If there is in existence a valid contract it is no defence at law for a party to say that it involves a great hardship to the defendant though it is otherwise faultless and as such the legal relief cannot be refused or mitigated on any such consideration. The relief of specific performance being equitable is discretionary and the Courts may refuse to grant specific performance of a contract if it involves hardship or amounts to an unfair advantage to one of the parties, although there is no fraud or misrepresentation on the part of the plaintiff. In *Preston v. Luck*<sup>75</sup> Cotton, L.J., said, "In specific performance, the Court does not grant that special equitable relief if it finds for any reason that it would be what is called a hardship, or unreasonable to compel the defendant specifically to perform the contract."

A is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase money should go to B. A, forgetting the condition, contracts, before the expiration of twenty-five years, to sell the land to C. Here, the enforcement of the contract would operate so harshly on A, that the Court will not compel its specific performance in favour of C.<sup>76</sup>

A's property is put to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked to B at a low price. Specific performance of the contract should be refused to B.<sup>77</sup>

Similarly, where a *purdanashin* lady took a loan from her own *mukhtar* at an exorbitant rate of interest, the security being ample, the Privy Council, following *Beynon v. Cook*,<sup>78</sup> held that the bargain was hard and unconscionable and that the contractual rate of interest could not be enforced in equity.<sup>79</sup>

The defence is not available where the defendant entered into the contract with eyes open and knowing fully the implications or consequences of his bargain.<sup>80</sup>

The question of hardship or unreasonableness is to be judged in reference

74. Provided for under sub-sections I and II of Section 22 of the Specific Relief Act, 1877 re-enacted under clauses (a) & (b) of Section 20 (2) of the Act of 1963.

75. (1884) 27 Ch. D. 497, 506.

76. Illustration (e) to Section 22, Specific Relief Act, 1877.

77. Illustration (d) *ibid*.

78. L. R. 10 Ch. App. 391.

79. *Kamini Sundori Chaudhrani v. Kali Prossunno Ghose*, (1886) 12 Cal. 225 (P. C.).

80. *Radha Kant Pal v. United Bank of India Ltd*, A. I. R. 1955 Cal. 217.



to the facts or position of the parties at the time of the contract;<sup>81</sup> if it then be fair and just and not productive of hardship, subsequent events cannot be relied upon for defence on these grounds<sup>82</sup> unless hardship has resulted from the act of the plaintiff<sup>82a</sup>. It may further be noted that the hardship should be one collateral to the contract and not in relation to a term of the contract.<sup>83</sup>

(3) **Absence or Inadequacy of Consideration.**—Specific performance of a voluntary contract, that is a contract without consideration, cannot be enforced in equity on the principle that "Equity will not aid or volunteer". Mere improvidence or inadequacy of consideration does not of itself afford any defence to an action of specific performance unless the consideration for the contract is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances, evidence of fraud or of undue advantage taken by the plaintiff.<sup>84</sup>

(4) **Non-Performance or violation of an Essential Term.**—If the plaintiff becomes incapable or otherwise fails to perform or violates or acts in contravention of<sup>84a</sup> an essential term or condition of the contract, he cannot get specific performance of the contract.

A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract. Similarly, where in an agreement for the lease of a house there is a stipulation for some alteration and repairs which is not effected, specific performance cannot be granted. The same result would follow where the earnest money is required to be deposited within a month and no deposit is made within the stipulated time.

(5) **Delay or Laches.**—If time is of the essence of a contract, specific performance of the contract must be sought within that time. Time is of the essence of a contract where it is expressly agreed to be so or where it appears to be so from the nature<sup>85</sup> or terms of the contract, *e. g.* mercantile contracts. In contracts where time is not of the essence of the contract, the plaintiff must still show himself "ready, desirous, prompt and eager."<sup>86</sup> Unreasonable delay in enforcing his claim or in the performance of his part of the contract will, as a rule, be a defence to an action for specific performance of the contract.

81. See, however, *Peer Mahomed v. Mahmud* I.L.R. 29 Bom. 234, where it was held that the second clause of Section 22 of the Specific Relief Act no doubt contemplates that, as a general rule, the question of the hardship of a contract is to be judged at the time at which it is entered, but it also contemplates an exception to the general rule in cases where causes involving hardship have occurred subsequent to the contract due in some way to the party who seeks specific performance.

82. *Kunjumohammad v. Goverdhan*, A. I. R. 1956 Trav. Co. 93, relying on *Sankaralinga Nadar v. Ratnaswami Nadar*, A. I. R. 1952 Mad. 389, where the hardship pleaded was that due to abnormal rise in the price of the subject-matter of the contract.

82a. Explanation 2 to Section 20 (2) of the Specific Relief Act, 1963 adding express provision to that effect while specifying that the time for adjudging hardship is the time of the contract.

83. *Kunjumohammad v. Goverdhan*, A. I. R. 1956 Trav. Co. 93.

84. Section 28 (a), Specific Relief Act, 1877 re-enacted under Explanation I to Section 20 (2) of the 1963 Act.

84a. Expressly added by this 1963 Act with a view to incorporate the principle laid down by the Privy Council in *Shish v. Bonomali*, (1904) I. L. R. 31 Cal. 584, 596 (P. C.).

85. *Mahendra Nath v. Sambu Bibi*, 30 Cal. 265.

86. *Milward v. Thamet*, (1801), 5 Ves. 720, n. referred to and relied on in a number of cases by Courts in India, *e. g.* *Peer Mohammed*, 29 Bom. 234.

The Specific Relief Act, 1963 like the Act of 1877 contains no provision on the point and the reason for this, as given in the Statements of Objects and Reasons of the Bill for this Act of 1877 is that the provision under Limitation Act,<sup>87</sup> "that suits for specific performance must be brought within three years from the day on which the plaintiff has notice that performance is refused, renders the doctrine of laches inapplicable to this kind of litigation." The attitude of the Courts, however, is not quite consistent with the object of the Act and although the general rule unquestionably is that mere delay will not constitute a defence to an action for specific performance, there are cases<sup>88</sup> which lead to the conclusion :—

- (i) that the relief of specific performance, being in the discretion of the Courts, may be refused even within the time prescribed by law ;
- (ii) that the Court will exercise such discretion in refusing specific performance of contract when time is of the essence of the contract or the delay is such that, under the circumstances of the case, it amounts to acquiescence or waiver or has led the defendant reasonably to change his position ;
- (iii) that such a discretion must be exercised sparingly and in exceptional circumstances.

(5) In *Satyanaraina v. Yellogi Rao*, A. I. R. 1965 S. C. 1405 1410 the Supreme Court after noticing the statutory provisions in India (S. 22 of the Specific Relief Act, 1877 corresponding to S. 20 of the Act of 1963 and Art. 113 of the Limitation Act, 1908 corresponding to Art. 54 of the Act of 1963) and reviewing the case law in England and in India stated the law on the point as follows :

"While in England mere delay or laches may be a ground for refusing to give relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the discretion or defendant does not empower the court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said reliefs for if abandonment or waiver is established, no question of the part of the court would arise.....(viz. expression 'waiver' has have been used) in its legally accepted sense, namely, "waiver is contractual and may constitute a cause of action : it is an agreement to release or not to assert a right".....It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

For the proposition that in India, mere delay can be no ground for refusing specific performance reliance was placed on the three years limitation for these suits adding, "If the suit is in time delay is sanctioned by law : if it is beyond time, the suit will be dismissed as barred by time.

87. At present Art. 54 of the Limitation Act, 1963.

88. See *Mukund Lal v. Chotey Lal*, 10 Cal. 1061 ; *Kailas v. Bejoy*, 23 C. W. N. 190 ; *Swarath v. Ram Ballabh*, 47 A. 784 ; *Raja of Vijianagram v. Maharaja of Jeypore*, A. I. R. 1944 Mad. 518.

## JUDGMENT AND RELIEFS

• In an action for specific performance of contracts the usual order is that upon the purchaser (or lessee *etc.*, as the case may be) paying to the vendor (or the lessor *etc.*, as the case may be) the consideration or the balance thereof, the vendor will execute the proper conveyance of the subject-matter of the contract. In case there is any difference between the parties as to the form or terms of the conveyance, it will be settled by the Court. In a large number of cases no relief ancillary to that of specific performance is required and as such no further question arises in those cases. But there are cases in which some ancillary enquiry or relief is necessary before specific performance may be had or ordered. It may, for instance, be necessary to enquire whether the vendor has the requisite title to the property in question or to take an account of the rents and profits of the property or to ascertain the damages caused to either party. The most important of such reliefs is in cases of contracts with imperfect title. Besides these, there arises the question of compensatory relief in substitution for or in addition to that of specific performance. Then there may be cases wherein some other relief is necessary. These enquiries may be completed under the following three heads : (1) cases of imperfect title ; (2) compensatory relief ; (3) other reliefs.

(1) **Cases of Imperfect Title<sup>89</sup>.**—In contracts for the sale or lease of property where the vendor's or the lessor's title or interest in the property is less than that stipulated for transfer, the purchaser or the lessor has the following rights<sup>90</sup> :

- (i) If the vendor or lessor has, subsequently to the contract, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.<sup>91</sup>

The same principle, *viz.* interest when it accrues feeds the estoppel, is laid down in Section 43 of the Transfer of Property Act, 1882. A agrees to sell a house X to B for 50,000. The house did not belong to A but to F who, however, makes a gift of the same to A. B is entitled to enforce the contract against A. Similarly, where A agrees to lease a plot of land to B for five years, but that land does not belong to A but is subsequently taken by A from the owner on lease, say for twenty years, A may be compelled to perform the contract.

It must, however, be noted that the rule will not apply to cases where the interest sought to be transferred has been expressly rendered inalienable by law.<sup>92</sup> It is further necessary that there must be an identity between the interest agreed to be transferred and that subsequently acquired. Accordingly, where A contracts to sell a property as the guardian of X and subsequently acquires the property in his personal capacity, he cannot be compelled to transfer the property in fulfilment of the contract.

- (ii) Where the concurrence of other persons is necessary to validate or give effect to the contract, and they are bound to do so at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence.<sup>93</sup>

89. See also pp. 385-386 *supra* on this topic

90. Section 13 (1), Specific Relief Act, 1963, which is analogous to the English law on these points

91. Section 13 (1) (a), Specific Relief Act, 1963 ; see *Kalyanpur Lime Works Ltd. v. State of Bihar and others*, 1954 S.C.R. 958, where and agreement for a lease of 20 years was enforced after 14 years when lessor acquire the right to grant lease for the residual period of 6 years on the principle of Section 15 of the 1877 Act.

92. See Section 6 of the Transfer of Property Act, 1882.

93. Section 13 (1) (b), Specific Relief Act, 1963.

Thus, a Hindu father governed by the Mitakshara School of Hindu law may be compelled to obtain the assent of his sons when transferring family property for the discharge of an antecedent debt. The underlying principle is that the vendor or lessor is bound to do all in his power to fulfil his promise or obligation under the contract.

- (iii) Where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage, to obtain a conveyance from the mortgagee and then to give effect to the contract in his favour.<sup>94</sup> This is obviously limited to cases of sale. Under sub-section 5 (b) of Section 55 of the Transfer of Property Act, 1882, the purchaser may pay off the encumbrance himself out of the purchase money, if any, in his hands.

The above provisions are, in so far as may be, applicable to contracts for sale or hire of movable property.<sup>94a</sup>

(2) **Compensatory Relief.**—The question of compensatory relief may arise either in lieu of specific performance or in addition to it and the Court may award such compensation to the parties as may be equitable under the circumstances. So where the contract is one which cannot be specifically enforced, *e. g.* one in respect of an ordinary commodity or personal service *etc.* or one which is otherwise hard or unreasonable, the Court may award to the promisee such damages as may be sufficient to compensate him for the non-fulfilment of the contract. Similarly, where the contract was to be performed at or within a particular time and it is appreciably and prejudicially delayed by the default of one party, the Court may award compensation in money together with the specific performance of the contract.

The assessment of the compensation which was left, in the old Act, to be determined in such manner as the Court might direct is now required to be determined in accordance with the principles of Section 73 of the Indian Contract Act, 1872.

Formerly in England, a suit for specific performance was not entertained at all except where the remedy at law by damages was inadequate and the Court of Chancery had no power to award damages. Accordingly, if the suit for specific performance was dismissed, it was without prejudice to the other rights of the plaintiff. Subsequently, by Lord Cairns Act, 1858, the Court of Equity was entitled to award damages in lieu of or in addition to specific performance and do complete justice in each case.

Section 21 of the Specific Relief Act, 1963, seeks to lay down the same law in India. The object of this section is to prevent a multiplicity of proceedings. This section must be read together with Section 24 of the Act which makes the dismissal of a suit for specific performance a bar to any other suit for damages for breach of the contract. It thus becomes obligatory for the plaintiff to claim both the reliefs in the same action. The Court could formerly award damages, in addition to or in lieu of specific performance, in a proper case even if no express prayer had been made by the plaintiff. Section 21 (5) now expressly provides that no compensation shall be awarded unless so claimed in the plaint initially or by means of an amendment.

It may as regards damages or compensatory relief in cases of service

<sup>94</sup> Section 13 (1) (c), Specific Relief Act, 1963.

<sup>94a</sup> Section 13 (2), Specific Relief Act, 1963.

contracts be added that the question would not arise if the termination is valid as states in *Calcutta Chemical Co. v. D. K. Barman* A. I. R. 1969 pat. 371,384, "Under the law of master and servant, the employer (no less it is submitted than the employee) has a right to terminate the contract of employment by giving the requisite notice of termination, if the period is fixed by an express or implied agreement, or by giving a reasonable notice. In case he dismisses or discharges the employee, finding him guilty of a fundamental breach of duties under the contract of employment, not in the sense of holding him guilty in a court of law but observing him guilty and telling him to be so" after reasonable opportunity of defence he need not give notice or wages in lieu thereof.

Even where dismissal or discharge is invalid the damages would, it is submitted, be according to the period of further service which is possible and permissible and the reasonable period for finding other and alike service elsewhere.

(3) **Other Reliefs.**—If a contract of sale (or lease) falls through by reason of the default or want of title of the vendor (or lessor), the opposite party is entitled to his deposit, if any, back together with interest and to a lien for the amount on the subject-matter of the contract.<sup>95</sup> If the purchaser is in default he cannot recover the deposit or any part of it.<sup>96</sup> Where the purchaser has paid the whole consideration before discovering the incumbrance, he may sue for damages and recover the same. The Court may in a proper case allow the purchaser to deduct from the consideration any amount of loss or damage that may have been caused to him due to the other party or may declare the vendor's lien in the property for unpaid purchase money, interest and costs.

### PARTIES TO AN ACTION FOR SPECIFIC PERFORMANCE

The Specific Relief Act, 1963, like that of the earlier Act, lays down the law on the point under two heads. Section 15 of the Act is under the heading 'Who may obtain specific performance'. Section 19, on the other hand, lays down the law on "Against whom contracts may be specifically enforced". Stated briefly, the law comes to this :

A suit for specific performance of a contract is maintainable by and against :

- (i) the parties to the contract ; and
- (ii) their representatives-in-interest.

The various classes of persons enumerated under Sections 15 and 19 are only examples of and, strictly speaking, fall under either of these two categories. The following provisions may, however, be mentioned in particular :

(a) Where the contract involves the personal skill, learning or quality of a party and his part of the contract has not been performed, his representatives-in-interest cannot claim specific performance<sup>97</sup> except where performance by representative-in-interest or principle is accepted by the other side<sup>98a</sup>.

(b) In case of a family compromise or marriage settlement any person beneficially entitled under the settlement may claim specific performance. Under section 19 (b) Specific performance of a contract is enforceable against any

95. Section 13 (1) (d), Specific Relief Act, 1877.

96. *Bishan v. Radha*, (1897) 19 All. 489.

97. *Mahendra Nath v. Sambu Bibi*, 30 Cal 265.

97a. Proviso to Section 15 (b) of the Specific Relief Act, 1963.

person claiming under a party to the contract by a title arising sub-sequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract and the requirement of "good faith" came up for consideration in *Shanker Pd. Muneshwari*<sup>97b</sup> and it was held by distinguishing English cases on the point that the failure on the part of subsequent transferee to enquire about the nature of the plaintiff's interest or equities in the subject matter of the contract and sale held by him as a tenant would not negative the existence or requirement of good faith so as to save his title to property purchased by him.

(c) If either party to the contract is a company which is subsequently amalgamated with another or if the contract was entered into by or with the promoters of a company the contract may be enforced by or against the new company.

(d) If either party to the contract is a limited owner, e. g. a tenant for life or joint tenant and the contract was within the competence of such person and the benefit or the burden thereof accrues to others, e. g. remainderman or other joint tenants, specific performance may be had by and against those persons.

A, the tenant for life of an estate with remainder to B, consistently with the terms of the settlement contracts to sell a part thereof to C. A dies. B may enforce specific performance against C.

If, however, the contract is with X in one capacity he cannot have its benefit or be subject to its burden in another capacity. Thus, where the mother acting as guardian and next friend, contracted to sell immovable property belonging to her infant son who died before the confirmation of the sale by the District Judge and the mother inherited the property as heir, it was held that the suit for specific performance of the contract was not maintainable against her<sup>98</sup>.

Where A entered into a contract to sell his property to B, but subsequently sold the property to C and D by two sale deeds, forming part of the same transaction. The whole consideration was not paid by C and D to A before notice of the prior contract. In a suit by B against A, C and D for specific performance the Court held that B will be entitled to a decree for specific performance of his contract.<sup>99a</sup>

Similarly where the father contributing with his five sons a joint Hindu family under the Mitakshara law contracted in his individual capacity and not as *karta* to sell a house belonging to the joint family, it was held that the suit for specific performance would not be decreed as against the sons because they were not parties to the agreement (not in the suit) nor as against the father as to his 1/6th share as not fulfilling the conditions for specific performance of the part of the contract<sup>99b</sup>.

With a view to make a specific provision in that behalf and resolving the conflict of decisions between different High Courts Section 16 by means of the Explanations added to it requires that the plaintiff in a suit for specific performance must aver performance of or readiness and willingness to perform the contract according to its true construction adding, however, that where

97b. A. I. R. 1969 Pat. 304.

98. *Rash Moni Dassi v. Soorja Kanta Roy*, 32 Cal. 832.

98a. *Simanchal Mahapatra v. Budhi Ram Padhi*, A. I. R. 1976 Orissa 113.

98b. *Khabi Panigrahi v. Kamla Devi*, A.P.R. 1967 Crim. 100.

contract involves payment of money it need not have been actually tendered to defendant or deposited in court.

The scope of these provisions came up for adjudication in *Ram Baran v. Ram Mohit*, A. I. R. 1967 S. C. 744 and it was held that in substance these statutory provisions (Secs. 23 and 27 of the Specific Relief Act, 1877 read with Secs. 37 and 40 of the Indian Contract Act) lay down that subject to certain exceptions, a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees. On the question of the enforceability of the pre-emption clause in an award by or against the parties to that award it was held that while it is true that the pre-emption clause did not expressly state that it would be binding upon the assignees or successors-in-interest, such intention was manifest from the context and the circumstances in which the award was made.

In *Gamathinayagam Pillai v. Palaniswami Nadar*, A. I. R. 1967 S. C. 868, the Supreme Court held that in a suit for specific performance of an agreement the plaintiff must plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of bearing of this act. Accordingly where the Trial Court had dismissed the suit on a good and reasonable finding against the plaintiff on this point and the High Court without and advertent to that aspect of the case or reversing that finding, decreed the suit for specific performance, the Supreme Court in appeal by special leave under Art. 136 of the Constitution adhering to the normal rule against reappraisal of evidence, set aside the decree of the High Court and restored that of the Trial Court.

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## CHAPTER XXXIV

### INJUNCTION

#### Introductory

Injunction, as defined by Burney, is "a judicial process by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful Act"<sup>1</sup>

As referred to earlier injunction is another mode of enforcing specific performance and in a sense included within that term. When a person is, by contract or otherwise, under an obligation not to do a particular act, *e. g.* not to set up a rival business or not to encroach on another's land, the best form of relief is to prevent that person from doing such act and the Court of Chancery in England secured this by means of injunctions. Disobedience to an injunction is punishable as contempt of court by imprisonment in case of natural persons and sequestrations in case of corporations. "The remedy of injunction was undoubtedly borrowed by the Chancellors from the interdicts of the Roman Law".<sup>2</sup>

The writ of injunction was peculiar to Courts of Equity although the common law had, in certain cases, the analogous power of prohibiting the committal of wrongs : for instance, waste could be restrained by the writ of prohibition. But the cases in which the common law supplied remedies of this nature were so few and the procedure for them so cumbrous that they soon fell into disuse and all such reliefs were obtained through the Courts of Equity. The equitable jurisdiction in respect of injunction "was for a long time most pertinaciously resisted by the Courts of common law, especially when it was applied to stay suits and judgments in these Courts. But it was firmly established in the reign of King James the First, upon an express appeal to that monarch."<sup>3</sup> By the Common Law Procedure Act, 1854,<sup>4</sup> a limited power of granting injunctions was conferred on the Common Law Courts. After the Judicature Acts<sup>5</sup> every Division of the High Court has the same power to grant an injunction.

In India the law with regard to injunctions had been laid down under Sections 52 to 57 of the Specific Relief Act, 1877, which has been re-enacted as Sections 36 to 42 of the Act of 1963. "This has been done by selecting the leading principles upon which the English Courts are in the habit of acting in the exercise of their discretion and converting them into legislative rules of jurisdiction".<sup>6</sup> It must, further, be noted that rules 1 and 2 of Order 39 of the Code of Civil Procedure, 1908 lay down requisites and procedure for the grant of a temporary injunction during the pendency of a suit. Order 39, rule 2 (3) further empowers the Court to punish the disobedience as contempt of Court by imprisonment to the maximum of six months or fine or both.

1. Encyclopaedia of Laws of England by A.W. Renton, 1st ed., Vol. VI, p. 464.

2. Pomeroy's Equity Jurisprudence, 5th ed., Vol. IV, p. 933.

3. Story's Equity Jurisprudence, 3rd ed., p. 574.

4. Sections 81, 82.

5. Section 25 of the Judicature Act, 1873, re-enacted by Section 45 of the Judicature Act, 1925.

6. Commentaries on the Specific Relief Act by R. A. Nelson, 2nd ed., p. 71.



### Kinds of Injunction.

Injunction is an order of the Court for enforcing negative obligations by restraining the party to whom it is directed from doing that which he is under an obligation not to do. Such an order is, obviously enough, applicable to the commission of wrongful acts in future. It does not apply and cannot afford any relief in respect of breaches made or wrongful acts done before. It may be that the assistance of the Court is sought and received before the actual commission of the act and in that case no other or further question arises for consideration. But it may be and, of course, it is generally so, that the Court's assistance is obtained only after the commission of the act and in that case injunction is directed towards restraining the continuance of the act in question leaving from its purview the wrongful acts (or relief for them) done before the order of injunction becomes effective. There are, for the purposes of a relief, two possibilities in such cases. It may be that the particular act has not assumed a permanent and tangible form as, for instance, where A goes to office through B's premises or where A collects undesirable persons in his house who make noise all the night thus interfering with the peaceful living of his neighbour. In such cases damages are the appropriate and adequate relief which need and may be given to the plaintiff. Damages alone cannot, however, be an adequate satisfaction in the other class of cases where the particular act in question assumes and continues to have a permanent and tangible form as, for instance, where A has made any construction or fixture in B's land or where B's copyright or trade mark has been pirated say A. In such cases injunction in its usual restrictive or prohibitive form and effect will not afford adequate relief nor can it be made so by supplementing it with damages. It is essential that besides these reliefs a restorative order need be passed directing the defendant to restore the original state of things by undoing what he has done already, *i. e.* by ordering the defendant, in the above examples, to pull down or remove the building or fixture or to surrender or destroy the product of the piracy.

The term injunction is, in general, confined only to prohibitive or restrictive order and such orders wherein the Court goes further and commands the restitution of the former state of things are called mandatory injunctions.

An injunction (or restrictive injunction) may, therefore, be defined<sup>7</sup> as an order of the Court restraining the person to whom it is directed from doing, continuing or repeating some wrongful act which constitutes a breach of a legal or equitable obligation or duty. When an injunction is granted to prevent a threatened wrong it is called a *quia time* injunction.

A mandatory injunction may be defined<sup>8</sup> as an order of the Court not only restraining a person from future wrongful acts but directing him further to restore, as far as possible, the former state of things. A mandatory injunction "resembles in its effect the restorative interdict of the Roman law."<sup>9</sup>

In *Charrington v. Simons and Co. Ltd.*,<sup>9a</sup> it was observed that while considering the claim of mandatory injunction, the court had to take into account, among other relevant circumstances, the benefit which the order would confer on the plaintiff and the detriment which it would cause to the defendant. The plaintiff should not be deprived of relief to which he was justly entitled merely because it would be disadvantageous to the defendant,

7. See Strahan's Digest of Equity, 3rd ed., p. 423.

8. See Section 39 of the Specific Relief Act, 1963 and Strahan's Digest of Equity, 3rd ed., p. 425.

9. Pomeroy's Equity Jurisprudence, 5th ed., Vol. IV, p. 970.

9a. (1970) 2 All E. R. 257.

but he should not be permitted to insist on a form or relief which would confer no appreciable benefit on himself and would be materially detrimental to the defendant.

"Although it may not be possible to state in any comprehensive way the grounds on which the court will refuse to grant a mandatory injunction in such cases at the trial, the courts, at least, include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a fair result and this involves the exercise of a judicial discretion."<sup>9b</sup> An interesting point was settled by the Supreme Court in *Viswanath v. Shanmugham*.<sup>9c</sup> The case arose out of suit for declaration that certain buses along with the stage carriage permits belonged to the plaintiff and that the defendant was holding and running the same simply as a *benamidar*. Further relief of mandatory injunction directing the defendant to execute the necessary document required to effectuate the transfer of permits was also prayed for. The Trial Court decreed the suit and it was affirmed by the District Judge but reversed in appeal by the High Court on the ground that the plaintiff and defendant practised a fraud on the authorities jointly in contravention of the express provisions of the motor vehicles. The *benamidar* of the vehicles, representing himself to be the owner, falsely obtained the permits in his name and allowed the true owner, who had no permit, to conduct the actual business, there cannot be a more flagrant violation of basic requirement of the Act or its scheme." The mandatory injunction was accordingly refused with the observation that would, in effect, give recognition to the fraudulent continuance and effectuate rights on the very basis of that continuance.

An injunction may be perpetual (or permanent), interlocutory (or temporary) or *ex parte*.

In a claim for injunction, the plaintiff must establish that the particular act complained of or sought to be restrained constitutes an infringement of his right and is a violation of the corresponding obligation or duty on the defendant and that the case is of a kind for which an injunction may be granted. If the plaintiff establishes all these constituents an injunction is issued restraining the defendant from committing or continuing the act complained of for all time or till the existing state of things or the relative positions of the parties should continue. Such an injunction is, therefore, called perpetual or permanent.

A perpetual injunction may be obtained only after a full trial or hearing of the case which usually takes a long time and it may be that the interest of justice equally with that of the plaintiff in a particular case requires that the order must issue soon. In such a case the plaintiff may pray for an interim relief. He moves an application for the issue of an injunction before the rights of the parties are finally adjudicated upon. The defendant is summoned to enter an appearance and show cause why it should not be granted. If the plaintiff makes out a *prima facie* strong case and binds himself to pay damages to the defendant in case his claim is not established in the final adjudication, an injunction is issued against the defendant. The life of such an injunction order is the duration of the trial when it is, if the plaintiff wins, converted into perpetual injunction or, if the plaintiff fails, it is cancelled. Such an injunction is, in reference to the nature of the proceedings, called interlocutory injunction or, in reference to its duration, it is called a temporary injunction.

9b. *Shephard Homes Ltd. v. Sandhan*, (1970) 5 All E. R. 402.

9c. A. I. R. 1969 S C. 493.

An essential difference between interlocutory and permanent injunctions is that in the former relief is given on the *assumption* that the plaintiff's allegations are true while in the latter on the *proof* that the plaintiff's allegations are true.

Some time<sup>10</sup> is required or would be lost in obtaining even an interlocutory injunction and the circumstances may be such that the plaintiff cannot afford to wait at all and an injunction ought to issue at once. In such a case an application together with an affidavit swearing the facts or circumstances which establish the urgency of the matter is made and the Court, if convinced of its expediency, may issue an injunction without hearing the opposite party, and it is, accordingly, called an *ex-parte* injunction. Such an injunction is, in general, of a very short duration and continues till the Court hears the opposite party against the continuation of injunction when it may be either discharged or extended till the final disposal of the case.

#### General principles underlying the relief of injunction.

The general principles underlying or regulating the grant of an injunction are the same as those involved in the specific performance of contracts or other positive obligations. Reference, however, need be made of the following points in particular :

1. The jurisdiction of the Courts in granting an injunction is, like all other equitable reliefs, discretionary.
2. The exercise of this discretion is not arbitrary but is regulated by settled principles.

The Supreme Court in *Delhi Municipality v. Suresh Chandra*,<sup>10a</sup> has said that section 41 (b) of the Specific Relief Act which lays down that an injunction, which is a discretionary equitable relief cannot be granted when an equally efficacious relief is obtainable in any other usual mode or proceeding except in case of breach of trust.

3. In exercising its discretion the Court will consider, among other things, whether the act complained of, if not restrained by an injunction, can be atoned for appropriately and completely through the legal relief of damages.

4. If the plaintiff establishes his right and the actual or threatened violation of it, injunction would be granted more or less as a matter of course unless it is, in the circumstances of the case, found to be inexpedient, unjust or oppressive. In granting injunction breach of obligations must be clearly proved. Where the plaintiff has failed to establish any deliberate and *mala-fide* action of defendants leading to loss, the relief of injunction could not be granted.<sup>10b</sup>

The Courts would grant an injunction more readily in case of continuing wrongs as compared to those which are isolated and may be occasional.

5. The Court requires stronger grounds and more promptitude for a mandatory injunction as compared to a restrictive injunction.

6. In granting or refusing an injunction and specially an interlocutory injunction, the Court is generally guided by the consideration of the balance of convenience in each case.

7. The grant of injunction is, like all other equitable relief, subject to equitable conditions that must be satisfied by or to equitable terms that may be

10. Say, a month or so in the course of which summons may be served on the opposite party and reasonable time is allowed for an appearance.

10a. A. I. R. 1976 S. C. 2621.

10b. Subarna Barik v. State of Orissa, A. I. R. 1976 Ori. 236.

imposed on the parties according to the facts and circumstances of each particular case.

### Cases where Injunction will be granted.

The proposition need be investigated from two points of view : *firstly*, in reference to the purposes for which an injunction may be sought and granted ; and *secondly* in reference to the requisites for the grant of the relief of injunction in each case.

The purposes for which an injunction is granted may be classified under three heads :

- (A) Injunction for the purpose of maintaining the *status quo*.
- (B) Injunction for the purpose of restraining judicial proceedings.
- (C) Injunction for the purpose of preventing the breach of a duty or obligation.

#### (A)

This is mainly the object of an injunction when it is interlocutory or mandatory. The requisites, in so far as peculiar to such an injunction, have been given above and nothing further or in particular need be noted on this point.

#### (B)

Formerly, the Court of Chancery frequently granted an injunction to restrain proceedings in a court of common law. These were known, as "common injunctions" as distinguished from all other injunctions which were called "special injunctions". Common injunctions were granted to prevent the commencement or continuance of proceedings which were opposed to the principles of equity.<sup>11</sup> This jurisdiction was, in effect, abolished by Section 24 (3) of the Judicature Act, 1873, which has been re-enacted by Section 41 of the Judicature Act, 1925. The practice has since then been that no cause or proceeding in the High Court or Court of Appeal can be restrained by injunction, but a defence may be set up and a stay of proceedings may be directed by the Court before which an action is pending, upon any ground which, would have, before 1873, justified the Court of Chancery in granting an injunction to restrain the legal proceedings. It need be noted that the aforesaid provisions apply only to proceedings in the High Court or Court of Appeal and the High Court has still the power to restrain by means of an injunction proceedings in inferior and foreign Courts according to the earlier or original practice or principle.

In India, on account to the absence of separate Courts for law and equity, there has never been anything like common injunction. Provision has, however, been made for the purpose of avoiding multiplicity of judicial proceedings. Reference may here be made to two of the more important of such provisions under the Code of Civil Procedure, 1908. Section 10 of the Act seeks to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue by enacting that a subsequent suit in such cases shall be stayed. The section is restricted in its application to the Courts in India and the pendency of a suit in a foreign Court is no ground for staying a subsequent suit in an Indian Court. Further, Order 41, Rule 5 of the Act makes a provision for the stay of the execution proceedings by the Court to or from which an appeal has been preferred.

11. See *supra*.

## (C)

This, is, indeed, the most important class; and the largest number of cases of injunction fall under this category. The purpose of an injunction under this head is to prevent the breach of a negative obligation existing on or against the defendant and in favour of the plaintiff. Such an obligation may arise in different ways, which may, in the first instance, be classified under two heads:

1. **Contractual Obligations.**—Obligations arising by the act of parties, *i. e.* through a contract—express or implied.

A lets certain land to B agreeing not to build on or sublet it. A may sue for an injunction restraining B from building on or subletting the land in violation of the obligation expressly undertaken by him.

Similarly, A lets certain arable lands to B for the purposes of husbandry but without any express contract as to the modes of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seeds injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

The equitable jurisdiction to grant an injunction to restrain a breach of contract is closely allied to its jurisdiction to order specific performance of a contract. Section 38 (2) of the Specific Relief Act, 1963, in laying down the law with regard to the grant of an injunction to restrain breaches of obligation provides: "When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act (*i. e.* the chapter on "The Specific Performance of Contract)". Section 41 (e) of the Act further provides that "an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced." The equitable jurisdiction with regard to specific performance having been considered already it may only be said that the requisites for or the defences to the enforcement of an affirmative obligation under a contract will hold good also in the case of negative obligations.

It must, however, be noted that injunction is sometimes available although the contract is one which cannot be specifically enforced. The leading English case on the point is *Lumley v. Wagner*,<sup>12</sup> where Miss Wagner had agreed with Lumley that she would during a certain period sing at his theatre and would not sing anywhere else without his written permission. She subsequently entered into a contract with Gye and gave up her former engagement with Lumley who sought an injunction to restrain her from singing for Gye. It was held that the Court may interfere to prevent the violation of the negative stipulation although it could not grant specific performance of the positive agreement.

This decision has been the subject of much criticism by the Courts both in England and America.

In *Whitewood Chemical Co. v. Hardman*,<sup>13</sup> Lindlay, L. J., said that he looked upon *Lumley v. Wagner* as an anomaly not to be extended. Similarly Holmes, J., in *Javierre v. Central Altagracia*<sup>14</sup> expressed the opinion that for the Court to refuse to compel A to serve B and yet to enjoin him from serving any one else, is simply a distinction without a difference.

12. (1852) 1 De. G. M. & G. 604.

13. (1891) 2 Ch. 416.

14. (1910) 217 U. S. 502, 508

The present state of English law on the point though not quite clear may be stated as follows : "The principle of law laid down in *Lumley v. Wagner* will be followed if the negative stipulation is express and separable from the positive, but it will not apply to those cases where the negative stipulation is implied or follows merely from the affirmative agreement."<sup>15</sup> Thus in *White-wood Chemical Co. v. Hardman*,<sup>1</sup> where the manager of a manufacturing company had agreed that during a specified term he would give all his time to the business of that company, it was held that no injunction could be granted restraining the manager from giving part of his time to a rival company.

In India Section 42 of the Specific Relief Act, 1963, embodies the principle laid down in *Lumley v. Wagner* but goes ahead of the present English law on the point inasmuch as under this section it is immaterial whether the negative stipulation is express or only implied and an injunction is available in either case. Illustration (d) appended to Section 57 of the old Act and dropped in the new Act like all other illustrations in the old Act clearly explained the point : "B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of the contract. But he is entitled to an injunction restraining B from serving a rival house as clerk."<sup>17</sup>

The principle and law as to the validity and enforceability of negative covenants were within defined limits affirmed by the Supreme Court in *N. S. Golakari v. Century S. and M. Co.*<sup>17a</sup> After receiving the textual and judicial authorities in England and India it was observed, "The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract then those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unquestionable or excessively harsh or unreasonable or one sided....." It may be added that the Supreme Court quoted with approval the observation of the High courts in several cases including the Calcutta Court referred to above that "illustrations (c) and (d) to Section 57 of the Specific Relief Act in terms recognised such contracts and the existence of negative covenants therein....."

In view of what has been stated above one may find that the decision in *Vinod Chandra v. Vivekanand Mills*, A.I.R. 1967 lying 225 introduces some uncertainty in the law on the point.

The terms of appointment in this case provided that the employee shall be bound to serve the employer for a period of a five years from the date of the appointment with sincerity and devotion. It was held that there was no negative stipulation in the contract and the employer as such was not entitled to injunction restraining the employee from alike service elsewhere during the contractual period of service. Relying on its earlier decision in *Shree Ambarnath Mills Corporation, Bombay v. Custodian of Evacuee Property*, A.I.R. 1957 Bom. 119 to the effect that the negative stipulation not to sell

15. See Modern Equity by H.G. Hanbury, 4th ed., p. 610.

16. (1891) 2 Ch. 416.

17. See *Burn & Co. Ltd. v. McDonald*, 36 Cal. 354.

17a. A.I.R. 1967 S. C. 1098.

to an other could not be spell out of the affirmative agreement to one X, it was observed. "It is therefore, clear that in order to found a case for an injunction under Section 42 (of the Act of 1963) there must be a negative stipulation. The negative stipulation may be express or implied but it must be a distinct negative stipulation. The negative stipulation may be express or implied but it must be a distinct negative stipulation. The negative stipulation cannot be implied merely from the existence of the affirmative stipulation; the affirmative stipulation does not of itself imply a negative stipulation to do nothing inconsistent with it. There must be something in the contract apart from the affirmative stipulation can be spell out by necessary implication. There is no such thing in the present contract."

As regards the import of illustration (d) to Section 57 of the Act of 1877 (re-enacted verbatim by Section 42 of the present Act of 1963) it was observed that the illustration was based on the decision in *Montague v. Flockton*, (1873) 16 Eq. 189 which was overruled in *Whitwood Chemical Co. v. Hardman* (1891) 2 Ch. 416 and the dropping out of this illustration along with others serves as a pointer to the legislative intent of adopting the course of the latter decision. It may in this connection be noticed that the present Act of 1963 has omitted the illustration of the earlier Act in its entirety and as such nothing can be said to turn on the mere omission of this or any other illustration.

An important class of cases falling under [this head are those where injunction is sought to restrain the breaches of restrictive covenants running with the land. The law on the point has been briefly explained earlier,<sup>18</sup> and its consideration in detail would not be useful for the purposes of our enquiry. The only important question involved is when and under what circumstances an obligation of this nature exists between the parties and it is a fit and proper subject of the Law of Property.<sup>19</sup>

**2. Obligations arising under the general law.**—Obligations arising under the general law between persons placed in a particular situation and independently of any contract between them. Such cases may be further divided under three heads :<sup>20</sup>

(i) *Obligations arising under a trust.*

A, a trustee for B, is about to make an imprudent sale of trust property. It is the duty of the trustee not to make such a sale and he may, at the instance of B, be restrained from doing so by means of an injunction.

The following two points need specially be noted in this connection :

- (a) In the case of a breach of an obligation arising under a trust, it is for the purposes of obtaining an injunction, not necessary to show that there can be no adequate compensation for the breach complained of.
- (b) The rule is not confined to express trusts but is equally applicable to implied and constructive trusts. The case of *Caird v. Sime*<sup>21</sup> is notable on the point. Here a University Professor was held entitled to an injunction to restrain a member of the audience at his classes from publishing his unpublished lectures. The House of Lords took the line<sup>22</sup> that the publication was in the nature of a

18. p. 80 supra.

19. See Section 40 of the Transfer of Property Act, 1882.

20. See Section 38 of the Specific Relief Act, 1963.

21. (1887) 12 App. Cas. 326.

22. Modern Equity by H. G. Hanbury, 4th ed., p. 602.

breach of confidence which fell within the ordinary scope of equitable restraint.

(ii) *Obligations, the breach of which amounts to a tort or civil wrong.*

"A very large part of the whole province of Tort is a proper field for the injunction.....the only torts which lie outside the field of injunctions are assault and battery, false imprisonment and malicious prosecution."<sup>23</sup> The more important classes of torts for the purposes of an injunction are, however, those of nuisance, defamation, waste and trespass.

The primary consideration in all such cases is whether the act complained of and sought to be restrained by means of an injunction amounts to a tort or breach of an obligation and it cannot appropriately be included in the present investigation. It need only be noted that for any tort committed by B against A, A is always entitled to recover from B damages which the Court may deem fit to award as a satisfaction for the wrong. Injunction is ordinarily an additional remedy except where it is *quia timet*, i. e. obtained before the threatened wrong is actually accomplished.

(iii) *Any other obligation legal or equitable, e. g. infringement of a copyright, trade-mark, patent or of obligations arising by virtue of membership of an association. Here again the question of the right and what amounts to its infringement must be left over and attention need be drawn only to the relief in question on the assumption that the breach of an obligation has been caused.*

In both these cases, i. e. (ii) and (iii), the requisites for the relief of injunction are :—

- (a) where there exists no standard for ascertaining the actual damage caused or likely to be caused, by the invasion, e. g. where A threatens to disclose defamatory communications against B or where X is prevented from the privileges of membership of a certain association ;
- (b) where the invasion is such that pecuniary compensation would not afford adequate relief, e. g. where the nuisance is injurious to health or interferes with comfortable living or where the wrong is of a continuing nature ;
- (c) where it is probable that pecuniary compensation cannot be got for the invasion<sup>23a</sup> e. g. on account of poverty or insolvency ;
- (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings, e. g., where a number of persons are involved in a particular case or the wrong is continuous, e. g. copy of trade mark.

These requisites, it may be noted, are not quite distinct from each other and a large number of cases would fall under more than one category at the same time.

In *Kashmir Kaur v. Manohar Singh*,<sup>23b</sup> the defendant was restrained from proclaiming herself to be the wife of plaintiff on the ground that the defendant's claim or proclamation affected or interfered with the plaintiff's right or status of marriage.

23. Maitland's Equity, 1916 ed., p. 325.

23a. Section 54 (d) of the old Act which has been dropped the corresponding Section 38 of the new Act,

23b. I. L. R. 2 Punj. 657



### Cases where injunction will not be granted.

"As laid down under Section 41 of the Specific Relief Act, 1963, an injunction cannot be granted—

- (i) to restrain a person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;
- (ii) to restrain a person from instituting or prosecuting proceeding in a court not subordinate to that from which an injunction is sought ;
- (iii) to restrain persons from applying to any legislative body.

This prohibition or exception is based on considerations of public policy. In England it does not appear to be clear whether the Courts have such a power or not but the practice is undoubtedly against any such interference. In India the law has been made definite by importing in clear terms in English practice.

- (iv) to interfere with the public duties of any department of the Government of India or the State Government, or with the sovereign acts of a Foreign Government.<sup>23c</sup>

This stands now repealed in view of the fact that the former would conflict with the second proviso to Article 361 (1) of the Constitution and the latter being too well known and settled is unnecessary.

In applying this exception it is necessary to keep in view the fact that it is confined to or assumes that the act is authorised by statute or otherwise and is, accordingly a lawful exercise of the power or discharge of the duty. There is nothing to restrict the power of the Court in granting an injunction to prevent a wrongful or tortious act. There is a separate provision under Chapter VIII of the Act for "The Enforcement of Public Duties".

- (v) to restrain a person from instituting or prosecuting proceedings in a criminal matter ;<sup>24</sup>
- (vi) to prevent the breach of a contract, the performance of which would not be specifically enforced ; *e. g.*, no injunction would be available for restraining the breach of a contract for personal service.<sup>25</sup>
- (vii) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.

The object of this rule can only be to prevent the grant of an injunction where the nuisance is "of too slight a nature"<sup>26</sup> or consist only of "trifling inconveniences",<sup>27</sup> because the obligation or breach thereof is not clearly established, there is no question of an injunction, be it a case of nuisance or otherwise. In such cases damages or nominal damages would be adequate satisfaction.

- (viii) to prevent a continuing breach in which the plaintiff has acquiesced ;
- (ix) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

23c Section 56 (d) of the Act of 1877 dropped from Section 41 in the new Act

24. See p. 352 *supra*.

25. *Ram Fari v. Municipal Committee, Pathankot*, A. I. R. 1956 Punj. 220 relying on *Whitewood Chemical Company v. Hardman*, (1891) 2 Ch. 416, 422.

26. *Snell's Principles of Equity*, 23rd ed., p. 588.

27. *Modern Equity* by H. G. Hanbury, 4th ed., p. 606.

(x) when the conduct of the plaintiff or his agent has been such as to disentitle him to the assistance of the Court ;<sup>28</sup>

(xi) where the plaintiff has no personal interest in the matter. <sup>9</sup>

It is an elementary principle of law that no plaintiff can maintain a suit in the subject-matter of which he has no personal interest. It is, however, not essential that the plaintiff's interest must be proprietary and if he has some interest in the matter, the *quantum* of that interest is immaterial.

Section 40 of the Specific Relief Act, 1963, lays down that the plaintiff in a suit for perpetual or mandatory injunction may claim and be awarded damages in addition to or in lieu of damages. Such relief must, however, be expressly claimed in the plaint as initially filed or by amendment.

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28. See Supra.

## CHAPTER XXXV

### DECLARATORY DECREES

#### Introductory.

Relief available through a Court are divisible into two : (a) declaratory reliefs ; and (b) consequential reliefs. Declaratory reliefs are those where some right is declared in favour of the plaintiff but nothing is sought to be paid or performed by the defendant. Consequential reliefs are those which are generally combined with and follow from the declaration and wherein the party against whom it is granted is required to perform some act in satisfaction or furtherance of the declaration of the rights of the parties. Thus, where A claims that he is entitled to half the house in the occupation of B and brings a suit to enforce the same, the judgment of decree of the Court, in so far as it determines or declares that A has a right to half the house in question is declaratory while that which calls upon B to deliver half the house to A is consequential relief.

The division is not important or even relevant to the investigation in hand where both these reliefs are joined together and the Court has to make the declaration of a right as introductory to the main relief. We are, however, to enquire whether the plaintiff may seek or be granted a declaration alone without seeking any relief consequential thereto. Considering the proposition in a general way, there appear to be two reasons why no relief should be given in such cases :

- (i) Such reliefs would encourage frivolous or vexatious actions, specially because for a declaratory relief, whatever may be the value of the property affected thereby, a fixed and a small amount of court-fee (*e. g.* eighteen rupees, twelve annas in U. P.) is required to be paid by the plaintiff while, on the other hand, for a consequential relief the court-fee has to be paid on or according to the amount or value of the property claimed (*e. g.*, roughly about eleven or ten per cent. of the claim in U. P.). So where the property claimed is, say, worth Rs. 50,000 and A's claim is unfounded, weak or uncertain, he would not mind playing the mischief or taking a chance by seeking a mere declaration and if successful he would not mind paying if the other party even then resists the claim, any amount of court-fee, which is ordinarily recoverable as costs from the opposite parties, for obtaining the consequential relief.

It was accordingly observed by their Lordships of the Privy Council that "There is so much danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits not be converted into a new and mischievous source of litigation".<sup>1</sup>

Similarly, in another case, it was observed that "it is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape. When the evasion is successful, it cannot be touched, but the device does not deserve encouragement of favour"<sup>2</sup>.

1. *Narain Mitter v. Kishen Soondoy Dasse*, (1873) I. A. (Suppl.) 149, 162.

2. *Deokali Koer v. Kedar Nath*, (1912) 39 Cal. 704, 707-708.

- (ii) Such a relief would lead to multiplicity of suits for the same cause of action.

It must, on the other side of the proposition, be noticed that here are cases wherein the consequential relief cannot or need not be asked either because it is still premature or because it is unnecessary or does not lie. It would, indeed, be hard not to allow declaratory reliefs in such cases. Thus A, claiming to be the owner, is in possession of a house which B claims to be his own. A would, under the situation, be seriously prejudiced in his rights to the house both as to its peaceful use and occupation and to its sale or lease *etc.* to another. Obviously, A cannot force B to seek an adjudication of his claim. It would, therefore, be hard and in equitable if A is not permitted to sue for a declaration against B to clear his title and remove the cloud caused by the claim of B.

Before the Chancery Procedure Act, 1852, it was not the practice of the English Courts of equity to make a declaration of right except as ancillary to the relief required and capable of being enforced). By Section 50 of this Act, the Court of Chancery was enabled to make binding declarations of rights without granting consequential relief. This Act was very narrowly construed and the powers of the Court have since been greatly extended by Order XXV, rule 5 of the Rules of the Supreme Court and actions can now be brought merely to declare rights, though this jurisdiction is exercised with great caution.

In India, in the year 1854, for the first time, a similar provision was made<sup>3</sup> for the Supreme Courts of Calcutta, Bombay and Madras. It was then reproduced in the same form for all the Courts in India as Section 15 of the Code of Civil Procedure, 1859, and it was observed by their Lordships of the Privy Council<sup>4</sup> that the application of this section must be governed by the same principles as those upon which the Court of Chancery proceeds in reference to Section 50 of the Chancery Procedure Act, 1852. The Code of 1859 was repealed by the Code of 1877 and the provisions as to declaratory decrees were transferred to Section 42 of the Specific Relief Act, 1877, which after its repeal is now contained in Section 34 of the Act of 1963.

"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under the circumstances of the case to grant the relief prayed for."<sup>5</sup>

### Essentials of the Relief.

To entitle the plaintiff to maintain a suit under Section 34 of the Specific Relief Act, 1963, it is essential to establish the following three conditions :

- (1) That the plaintiff is, at the time of the suit, entitled to any legal character to any right as to property.

By legal character is meant what is ordinarily termed legal status such as legitimacy, marriage, divorce and adoption. A plaintiff may, therefore, sue under this section for a declaration that the defendant is not his or her son or that there is no subsisting marriage between him or her and the defendant. Similarly, if it concerns and affects A adversely, he may seek a declaration that Y is not X's adopted son or W is not the wife of H. In *Tasadduq Husain v. Wazir Ali*,<sup>6</sup> where the defendants had made a statement before the revenue

3. Section 29 of Act VI.

4. *Kathama Natchiar v. Dorasinga*, (1875) 2 I. A. 169.

5. *Narain Mitter v. Kishen Scindory Dassee*, (1837) I. A. (Suppl.) 149, 162.

6. (1906) P. L. R. 9.

authorities stating that the plaintiffs were *Shriks* and, as such not entitled to various rights in the village to which Rajputs alone were entitled, the Punjab Chief Court held that the plaintiffs were entitled to sue for a declaration that they were Rajputs of the specified *got*.

Similarly, a declaration may be sought and made in respect of a right to property. Thus X, an owner of land may bring a suit, against Y who claims to use the land as his own or as a public road. It is, however, essential that the plaintiff must show in him a present existing interest in the property, however distant the possibility of its coming into actual possession and enjoyment may be. A mere contingency, howsoever proximate and valuable, will not suffice. The interest of a Hindu reversioner during the widow's life is future and contingent. But this case has been treated as an exception and it is established that the reversioner can seek a declaration<sup>7</sup> that an alienation by the widow is without legal necessity and therefore void beyond the widow's lifetime.

Where the plaintiff filed a suit for a mere declaration of title to property the property then being in *custodia legis* having been attached under section 145 of the Cr. P. C., but subsequently the possession was delivered by the Criminal Court to the defendant, it was held that the suit was not bad for not asking for the further relief of possession.<sup>7a</sup>

(2) That the defendant has denied or is interested in denying the aforesaid character or right.

(3) That the plaintiff is then not in position to ask for a relief consequential upon the declaration prayed for.<sup>7b</sup>

If the plaintiff is able to seek further relief than a mere declaration and he omits to do so, the Court will not make the declaration sought. It was, accordingly, held<sup>8</sup> that a suit for a declaration of a right to pre-empt would not lie if not followed by a prayer for consequential relief. Setting aside of a decree, cancellation of an instrument and an injunction are all further reliefs within the meaning of Section 34 of the Specific Relief Act, 1963. The question of the plaintiff's ability to seek consequential relief is determined in reference to the time when the suit is instituted and subsequent events enabling the plaintiff to get the consequential relief will not vitiate the proceedings.

#### Effect of Declaration.

A declaration made under Section 34 explained above is, as laid down in Section 35 of the Act, binding only on the parties to the suit and persons claiming through them. In case one of the parties is a trustee, the beneficiaries under the trust would be bound by the declaration.

This section lays down the general doctrine with this important limitation that a decree under Section 34 of the Specific Relief Act though it relates to status which judgments are generally operative *in rem*, will be binding only between the parties to the suit and their representatives. This had been made clear by means of the illustration added to Section 43 of the old Act that a

7. See *Nagammal v. Agoramurti*, A. I. R. 1956 Mad. 248 for an authority that the rule in question is not inflexible and that in a proper case declaration may be granted at the instance of a person having simply a contingent interest in the property.

7a. *Jagdish v. Rajendra*, A. I. R. 1975 All. 395.

7b. The Law Commission in its report recommended that this proviso to this effect in this section be omitted in view of the change to that effect in the English and American laws and in particular of the provision to that effect under O. 2, R. 2 of the Code of Civil Procedure, 1908. But the proviso has been retained as before.

8. *Charan Das v. Amir Khan*. (1921) 48 Cal. 110.

declaration for A against B and her mother that B is A's wife will not be binding on C and will be no bar to a declaration sought by C that B is his wife. It is important to note that the illustration was in reference to the case of a Hindu. It is difficult to understand the object or effect of the illustration in particular but it appears that it was with a view to confine it to personal laws where matrimonial relief need not be obtained through a court of law, and to except such declarations under the Indian Divorce Act, 1869, which would be judgments *in rem*. If that be so, the illustration if retained would not be good in view of the Hindu Marriage Act, 1955.

In *Ramaraghava Reddy v. Sashu Reddy*,<sup>9</sup> the Supreme Court held that section 42 (corresponding to section 34 of the present Act, of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section.

The case arose out of a suit by the worshippers that a compromise decree is not binding upon the duty. It was held that being neither a suit as to legal character or right to property of the plaintiffs could not come within or governed by section 42 of the Specific Relief Act. A declaration of this kind is in itself a substantive relief and has immediate coercive effect and would be governed by the general provisions of the Civil Procedure Code like section 9 or 6,7, R. 7.

One may on principles find it hard to agree with the ratio of this decision and to delineate the area of its operation.

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9. A. I. R. 1967 S. C. 436.

## CHAPTER XXXVI

### RECTIFICATION, RESCISSION AND CANCELLATION

#### Nature and Scope of the Relief.

We have considered earlier<sup>1</sup> the subject of Mistake, Misrepresentation, Fraud and Undue Influence and have seen how a contract, grant or disposition of property is vitiated on account of mistake, *etc.* and the principles on and conditions under which the parties are relieved from the obligations under or the effects of such a transaction. We may now examine the reliefs which the Court of Chancery discovered for such cases. The equitable reliefs are, according to the classification made under the Specific Relief Act, 1963, divisible under three heads : (1) Rectification of Instrument<sup>2</sup> ; (2) Rescission of Contract<sup>3</sup>, and (3) Cancellation of Instrument<sup>4</sup>.

The common law Courts were utterly incompetent<sup>5</sup> to make a specific decree for any relief of this sort ; and without it, the most serious mischiefs could often arise to the parties concerned. These reliefs, therefore, originated in and were available from the Court of Chancery. Section 34 of the Judicature Act, 1873, provided that the jurisdiction as to rectification, the setting aside, and the cancellation of deeds and other written instruments shall be assigned to the Chancery Division of the High Court.

The exercise of this jurisdiction, like all other equitable reliefs, is eminently a matter within the discretion of the Court and none of these reliefs can be claimed as a matter of right. These reliefs are further subject to such equitable conditions, precedent or subsequent, which may appear just and equitable to be a requisite of or to be imposed on the grant of these reliefs according to the facts and circumstances of each case.

### RECTIFICATION OF INSTRUMENTS

#### Introductory.

A agrees with B to sell his house together with *one* of the three godowns adjacent to it, but in the deed of agreement purporting to incorporate this agreement all the three godowns are, either by common mistake or the fraud of B, included under the terms of the sale. Here the written agreement is different from the real agreement and is disadvantageous to A. There may, similarly, be a difference which is against B, as where the consideration of sale is Rs. 15,000 but it is represented in writing as Rs. 16,000. It is, in such cases, open to the parties to enter into the contract *de novo* or to execute the contract as agreed in fact and ignore the writing altogether. It is, however, not unlikely that A or B, as the case may be, is unwilling to remove the discrepancy and seeks to take advantage of it. Such questions, it need be remembered, are not confined to contracts but may arise in respect of any other instrument and we must enquire as to what is the Court to do in such a situation ?

The Court may say that the agreement between the parties is as it exists

1. See 187. et seq.

2. Section 26.

3. Sections 27 to 30

4. Sections 31 to 33.

5. Story's Equity Jurisprudence, 3rd, ed., p. 456.

in writing and the parties must be bound by it. This would obviously be hard and inequitable to at least one of the parties. The Court may, on the other hand, say that there is, under these circumstances no agreement at all and there is nothing to bind either party to such an agreement. This would not be fair to either and both would be deprived of the benefit of a genuine agreement. The only or the most equitable view would be to bind the parties to the real agreement and to ignore the writing or to rectify it so as to bring it into conformity with the actual agreement. The more important question for consideration is whether the party prejudiced by the contract must wait till the other party takes the initiative and brings a suit for specific performance? Equity does not deem it just or fair to restrict the parties to the defensive remedy and instead of obliging one of the parties to remain in suspense or fear of the uncertainties of an action by the other party allows him to bring a suit for rectification of the writing. A is thus entitled to get "three godowns" in the writing substituted by "one godown". Similarly, B is entitled to seek rectification of the deed so as to reduce Rs. 16,000 to Rs. 15,000.

A case of rectification usually arises in reference to marriage, settlements. So where a settlement of property is made to provide for the sons and daughters of X and Y and the reference to daughters is on account of oversight, omitted from the settlement, the settlement may be rectified so as to include the daughters within the benefit of the settlement.

The rectification of a deed, therefore, consists in making it conform to the intentions of the parties or the executant. Where a deed as executed is not according to the intention of the party or parties who have executed it, the Court, if it can ascertain what the intention was, will reform or rectify the deed in order to bring it into conformity with the actual intention.

#### **Requisites of the relief.**

In a suit for rectification of an instrument, the plaintiff must establish the following three essentials<sup>5a</sup> :

- (i) It must, in the first place, be proved that the instrument, as it exists, does not, through (a) fraud or (b) mutual mistake, truly represent the agreement or the intentions of the parties.

Where the error in the written instrument has been introduced by the fraud of one party, the equity of rectification is obvious. Where it is on account of mistake and such mistake is mutual, equity regards it as unconscientious for any of the parties to take advantage of such discrepancy. If the mistake be unilateral, the instrument cannot be rectified because to do so would in effect be to make for one party a new contract different from what he intended.<sup>6</sup>

- (ii) It must further be proved as to what is the precise form or terms which formed the basis of the agreement or represent the true intention of the parties and to which the deed is sought to be reduced. If the intention is not definite, there is nothing by which the Court may be able to rectify the instrument. A person who, when executing the instrument, does not know clearly his own mind must be presumed to mean what the instrument executed by him expresses.

- (iii) It must finally be established that the alleged intention to which

5a. *Madhauji v. Ram Nath*, 30 Bom. 457.

6. *Jawahar Singh v. Arjun Singh*, 8 O. C. 1.



the deed is sought to be made conformable, continued concurrently in the minds of all parties down to the time of its execution.

This forms the very basis of rectification and its absence is fatal to the relief. Rectification is desired simply to give an expression to something which existed as a fact and was intended to be included in the writing but has not been expressed or has been expressed wrongly. Rectification cannot, accordingly, be granted to introduce matter which has been completely overlooked on both sides, nor to add to the agreement a term which was not considered and agreed upon by the parties. So where a power to redeem or a power of revocation is intentionally left out of an instrument, under the mistaken notion that its insertion is either illegal or superfluous, no rectification can be made because the parties never intended that it should form part of the written instrument; and though the motive for its omission was a mistake of law, still to insert it afterwards would be to substitute a different instrument from what was within their intention at the time of its execution.

The burden of proof that the instrument does not agree with the intention is upon the plaintiff who seeks rectification and in order to discharge it he must adduce evidence, oral or documentary, that is clear, cogent and convincing and establishes definitely all the requisites for the relief. The writing must, otherwise, remain the sole exposition of the intent and agreement of the parties.

Rectification may be prayed for by the plaintiff or pleaded in defence by the defendant. It is, however, necessary to claim it expressly through the pleadings as initially filed or subsequently amended.<sup>6a</sup>

#### **Exception.**

The relief of rectification is obtainable only in so far as it does not prejudice the rights acquired by third persons in good faith and for value.<sup>6b</sup> This was clearly illustrated through the illustration (a) to section 31 of the Specific Relief Act, 1877, which ran as follows :

A, intending to sell to B, his house and one of the three godowns adjacent to it executes a conveyance prepared by B, in which, through B's fraud, all the three godowns are included. Of the two godowns fraudulently included, B gives (without any consideration) one to C, and lets the other to D, for a rent, neither C nor D, having a knowledge of the fraud. The conveyance may, as against B and C be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

There cannot be any time limit for the discovery of mistake or fraud and it is open to parties affected to come to court for rectification within a reasonable time after the fraud or mistake comes to right.<sup>6c</sup>

### **RESCISSION OF CONTRACTS**

#### **Introductory.**

A contract entered into under a mistake or fraud *etc.* may be void or voidable. If it is voidable, it cannot be challenged or avoided at the instance of the guilty party. The innocent party, on the other hand, has his choice in either affirming the contract or seeking to avoid it. If he adopts the latter course, he may set up, in defence, the circumstances which vitiate the contract or render it voidable when the other party brings an action on the

6a. Section 26(4) of Specific Relief Act, 1963.

6b. See Section 26 (2) of the Specific Relief Act, 1963.

6c. *Gerela Kalita v. Dharmeswar Saika*, A. I. R. 1961 Assam 14.

tract for damages or specific performance. The better form of relief, however, lies in decreeing rescission of the contract itself at the instance of either party when it is void and at the instance of the party entitled to it when voidable, and thus discharge the parties from all obligations under the contract.

A sells a field to B. There is a right of way over the field of which A has direct personal knowledge but which he conceals from B. B is entitled to have the contract rescinded.

Rescission of a contract is, therefore, an equitable remedy converse to that of specific performance and seeks to relieve the parties from the obligations of a contract which is inoperative or becomes so at the option of one of the parties to it.

Rescission when made.<sup>7</sup>

Any person interested in a contract may sue to have it rescinded and such rescission may be adjudged by the Court in any of the following cases :

1. Where the contract is voidable or terminable by the plaintiff.

It has been considered already how and under what circumstances a contract becomes void or voidable on account of mistake, misrepresentation, fraud or undue influence. It need only be added here that such a contract may be rescinded at the instance of the party entitled to it. Rescission may further be had of contracts which are terminable. A terminable contract is one which contains (as is frequently the case) a stipulation that in a certain event, e. g. when the vendor fails, within the stipulated time, to show a good title to the property in question or when the purchaser fails to pay a part of the consideration by the appointed date, the contract may be put an end to. Such contracts may, on the happening of such an event or on the fulfilment of the requisite condition, be rescinded.

2. Where the contract is unlawful for causes not apparent on its face ; and the defendant is more to blame than the plaintiff.

This comes as an exception to the general rule that the relief being equitable and discretionary, the Court insists on the necessity of clean hands<sup>8</sup> and will not accordingly relieve a party to an unlawful contract. The exception is based on the principle that although both participated in the guilty transaction, yet the plaintiff has done so under circumstances of oppression, imposition, hardship, undue influence or great inequality of age or condition ; so that in a moral or legal point of view, his guilt may well be deemed far less dark in its character and degree than that of the defendant.

A, an attorney, includes his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.<sup>9</sup>

3. Where a decree for specific performance of a contract of sale or for contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay.

The following points may be noted with regard to the relief or rescission :—

7. Section 35, Specific Relief Act, 1877 re-enacted substantially under Sections 27 and 28 of the Act of 1963.
8. See pp. supra for further discussion on the point.
9. Ill. (b) to Section 35 of the Specific Relief Act, 1877.

- (i) No rescission of a contract can be obtained unless *restitutio in integrum* is possible.<sup>9a</sup> If A enters into a contract with B under circumstances which entitle him to avoid the contract, it is a necessary condition of his obtaining the relief that he should be able to restore to B the *status quo*. A purchases goods from B on a misrepresentation, A cannot get rescission if he has disposed of or consumed the goods or has appreciably diminished their quality or value.
- (ii) The Court may, in adjudging rescission, impose<sup>10</sup> such conditions as to restoration of any benefit received or other compensation *etc.* on the parties as may be fair and equitable under the circumstances. Thus in rescinding a contract of sale of property at the instance of the vendor, the Court may impose the condition of this refunding the earnest money paid to him.
- (iii) The relief of rescission may be prayed for in the alternative in a suit for specific performance of the contract.<sup>10a</sup> There is no provision for the converse case under the Specific Relief Act and it has been held by the Supreme Court in *Ram Raj v. I. L. F. H. & Co. Ltd.*<sup>10b</sup> that the omission was deliberate and that it was not open to the plaintiff to sue for enforcement of the agreement and in the alternative for specific performance. As regards its permissibility under Order 7 Rule 7 of the C. P. C. it was added that it is true that the rule allows in consistent relief but it must be shown by the plaintiff that each of such pleas is maintainable. Reliance for the above proposition was placed on *Cawley v. Pool* (1863) 71 E. R. 23. The additional difficulty in the plaintiffs way, it was added, lay in the absence of the pleading as the readiness and willingness on his part to perform the contract which is necessary in a suit for specific performance.
- (iv) The relief of rescission may be refused if during the subsistence of the contract, third parties have acquired rights in good faith without notice and for value.<sup>10c</sup>

### CANCELLATION OF INSTRUMENTS

#### Introductory.

If a written instrument has served the purpose for which it was executed or is void or voidable against any person and he has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury; he may sue to have it so adjudged and the Court may in its discretion so adjudge it and order it to be cancelled and delivered up.

A conveys land to B who bequeaths it to C and dies. D is in possession of a forged instrument which purports to establish that A conveyed the land to B in trust for him (D). C may obtain the cancellation of the forged instrument.

The underlying principle of relief is that even in those cases where the instrument is altogether ineffective, it may have an appearance of validity and may, therefore, be used by an ill-disposed person for the purpose of annoyance, vexation and fraud by which time the evidence to impeach them may be lost.

9a. Section 36 of the old Act corresponding to Section 27 (2) (b) of the new.

10 Section 38, Specific Relief Act, 1877 re-enacted under Section 30 of the new Act.

10a. Section 37 of the old and Section 29 of the new Act.

10b. A. I. R. 1968 S. C. 1353.

10c. Section 27 (2) (c) of the Specific Relief Act, 1963.

# Requisites of the relief.<sup>10d</sup>

In a suit for cancellation of an instrument, the plaintiff must prove —

1. that the instrument sought to be cancelled is void or voidable against him ;
2. that he has reasonable apprehension of injury from the instrument if it is left outstanding ;
3. that the apprehended injury is serious.

So, where a testator on his death bed, said to his executrix that he had the bond of B, but when he died, B should have it and that he should not be asked or troubled for it, his executrix was decreed to deliver up the bond to be cancelled. Similarly, a deed of settlement purporting to convey property may be cancelled if the marriage in contemplation of which it had been executed cannot be performed on account of the death of either party.

The question of reasonable apprehension of injury from a particular instrument is determined with reference to the circumstances of each case. There is no ground for cancellation where the instrument cannot legally be used<sup>11</sup> for the purpose which is apprehended or where the recital objected to in the bond is no evidence of the fact recited.<sup>12</sup> Similarly, a deed of gift between Mohammedans need not, unless the donee is in possession, be cancelled because it cannot, unless followed by delivery of possession, have any effect at any time.

The following two points need further be noted in a relief of cancellation of instruments :

- (i) The Court may, if it is proper under the circumstances, cancel a part<sup>13</sup> of the instrument and allow it to stand for the rest, if the two relate to different rights or obligations or are severable.

A draws a bill on B, who endorses it to C, by whom it appears to be endorsed to D, who endorses it to E. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

- (ii) On adjudging cancellation, the Court may require the party to whom cancellation is granted to restore the benefit received or to make such compensation, if any, which justice may require.<sup>14</sup>

So where the Court is required to cancel a sale-deed on behalf of a minor, the Court may grant cancellation subject to the equitable condition that the minor repays the purchase money received by or for him.

## Main Requisite of Rescission and Cancellation.

The material question for consideration or decision in an action for rescission or cancellation is whether or not the contract or instrument in question is void or voidable. The subject has been considered already<sup>15</sup> and it need only be supplemented by the following cases on the point :

- (a) *Cooper v. Phibbs*.<sup>16</sup>—In this case, the plaintiff was the owner of a

10d. Section 31 of the Specific Relief Act, 1963.

11. *Shib v. Hira*, (1878) 1 All. 622.

12. *Sunker v. Juddoobuns*, (1868) 9 W. R. 285.

13. Section 32, Specific Relief Act, 1963.

14. Section 33, Specific Relief Act, 1963.

15. See Ch. XVI supra.

16. L. R. 2 H. L. 149.

certain fishery under a settlement made amongst his ancestors. He, not being aware of his title, agreed to take the fisheries on rent from his cousin sisters to whom he believed, as he always heard, is belonged. Soon afterwards he found that the fishery really belonged to him under the settlement and consequently brought a suit for cancellation and delivery up of the agreement to take the lease.

It was held that the agreement was vitiated by mutual mistake and must be rescinded or cancelled. The following passages from the judgment of Lord Westbury clearly explain the ground of relief for or the principle of law laid down in this case :

“It is said *ignorantia juris haud excusat* ; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact ; it may be the result also of law ; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon common mistake.”

- (b) *Stapilton v. Stapilton*<sup>17</sup>. - In this case S had two sons and there being a doubt as to the legitimacy of the elder, he made an arrangement with them by which on his death the estate was to descend to them in equal shares. Both the sons were parties to the deed. Subsequently, it was discovered that the elder son was a bastard.

It was held that the arrangement must subsist. The *ratio decidendi* of the case is this. Where a compromise has been fairly entered into, without concealment or imposition upon either side, with no suppression by either party of what is true or suggestion of what is false, then notwithstanding the subsequent discovery of some common error or that one party had nothing to give up, a court of equity will not disturb the compromise. It is upon this ground that family settlements or arrangements involving the giving up, partition or exchange of land to compromise doubts and disputes with regard to rights of different members of the same family are looked upon favourably by Courts of equity and cannot be set aside.

- (c) *Huguenin v. Baseley*.<sup>18</sup>—In this case, the plaintiff, a widow had made a voluntary settlement in favour of the defendant a clergyman who was entrusted by the plaintiff with the management of her affairs. The plaintiff, afterwards filed a bill seeking to set aside the conveyance as having been obtained by the exercise of undue influence.

The doctrine of undue influence comprises two categories of cases : (i) where the parties are under a fiduciary relationship ; (ii) where there does not exist any relation of the kind. In the former, the Court raises a presumption of undue influence which must be rebutted by the other party. In the latter, there is no presumption of undue influence and it must be established by the party alleging it.

It was, accordingly, held that under the circumstances of this case, the presumption of undue influence arose and the defendant being unable to

17. 1 Atk. 2.

18. 14 Ves. 273.

discharge the *onus* of proof that the settlement was the free act of the widow uninfluenced by him, the settlement must be set aside.

#### Distinction between Rectification and Rescission or Cancellation.

- (i) In case of rectification there exists, in truth, between the parties a complete and perfectly unobjectionable contract, though it does not correspond with the writing designed to embody it. It is not so with cancellation or rescission. There the contract or instrument either is or has become void or voidable.
- (ii) In rescission or cancellation the plaintiff seeks to avoid the contract or instrument altogether, while in rectification he does not seek to be relieved from the contract altogether but only in so far as it is on account of error.
- (iii) The grounds on which rescission or cancellation may be granted are wider than those required for rectification.
- (iv) The relief of rectification may be supplemented with a prayer for specific performance.<sup>19</sup> On the other hand, specific performance may only be alternated<sup>20</sup> with rescission and is out of question in cancellation.

#### Distinction between Rescission and Cancellation.

There is much in common between rescission and cancellation. In English treatises the two subjects are considered together and it is, indeed, doubtful whether any material distinction may be made out between the two. The Specific Relief Act in India, however, distinguishes these reliefs and has made separate provisions for the two. The division of the subject under the Act is considered<sup>21</sup> more systematic and convenient. The following distinction may, however, be made between the two with special reference to the provisions of the Specific Relief Act :

- (i) Rescinding a document implies that the document is still operative and by rescission its operation is put an end to, but cancelling document does not necessarily imply its being operative ; for it may really have long ceased or have never begun to be so ; and by cancellation it is merely made to appear upon the face of it that it is invalid ;
- (ii) The relief of cancellation is wider than that of rescission ; the latter being available in contracts only while the former is available with regard to any instrument, contract, will, settlement, surrender, etc.
- (iii) The relief of rescission is, generally speaking, given where the contract is merely voidable or where its unlawfulness or nullity is not apparent on its face, but the relief of cancellation includes void as well as voidable instruments and this is so whether the nullity is apparent on its face or not.

19. Section 26 (3), Specific Relief Act, 1963.

20. Section 29, Specific Relief Act, 1963.

21. See Collection the Law of Specific Relief in India, 4th ed., p 270

## CHAPTER XXXVII

### ENFORCEMENT OF PUBLIC DUTIES\*

In the preceding chapters on 'Specific Relief' we have considered questions affecting private rights and private duties in relation to their specific enforcement. It is, however, not only private rights and duties with which the Courts of Justice are to deal. Private rights sometimes give rise to public duties. Besides, there are officers and institutions upon whom it is incumbent to discharge duties of a more or less public character and as they sometimes fail to discharge such duties and obligations, public interest requires that adequate provisions should be made for their enforcement.

A public officer bound in law to issue copies of certain documents refuses to do so, or an officer charged with the preparation of electoral roll declines to register a certain name as a voter ; or a public officer, after removal from office, is not prepared to part with or surrender public books and papers in his custody or a particular corporate body refuses to perform its statutory duty affecting a particular individual. These are some examples of a large number and variety of cases that may crop up and need solution. The interest of justice requires that the State should provide a machinery or *forum* enforcing such duties and the rights correlated to them.

#### **Mandamus.**

The Common Law of England made a provision for such cases by means of the writ of *mandamus*. The writ of *mandamus* is so called from the words "*vobis mandamus*" i. e., "we command you" with which when the writ was in Latin, the mandatory part commenced. The prerogative writ of *mandamus* was issued in the King's or Queen's name from the Court of the King's or Queen's Bench Division of the High Court. The nature and scope of the writ may be briefly expressed through the following lines :

"The writ of *mandamus* is a high prerogative writ of a most extensive and remedial nature, and is, in form, a command issuing from the High Court of Justice, directing any *person, corporation or inferior Court* requiring him or them to do some particular thing therein specified which *appertains to his or their office* and is in the nature of a public duty. Its purpose is to supply defects of justice ; and accordingly it *will issue*, to the end that justice may be done in all cases where there is a *specific legal right* and *no specific legal remedy* for enforcing such right ; and it *may issue* in cases where, although there is an *alternative legal remedy*, yet such mode of redress is *less convenient, beneficial and effectual*."

#### **Provisions under the Specific Relief Act.**

In India, formerly the Supreme Courts and then the High Courts in the three Presidency towns of Calcutta, Madras and Bombay had the power to issue the writ of *mandamus*. The power was, however, *limited to the local limits of their ordinary original civil jurisdiction*. This power to issue the writ of

\*Chapter VIII (Sections 45 to 51) of the Specific Relief Act, 1877 on "Enforcement of Public Duties" stands repealed by the Act of 1963. To afford a comparative study, this Chapter is retained for the purposes of the present edition of the book.

*mandamus* was expressly taken away by Section 50 of the Specific Relief Act, 1877 and a substitutory power was conferred or relief provided for by Chapter VIII [Ss. 45-51] of the same Act. The alteration, however, was not of substance but of form. It may be noted that the subject is not one of Equity and its inclusion in the book was simply on account of these provisions under the Specific Relief Act till 1963. It need further be observed that the subject had already lost all its importance as a part or branch of the Specific Relief Act and now forms one of the most important topics under the Constitution of India.

### Essentials of the Relief.

The conditions under which the statutory power under Section 45 of the Specific Relief Act, 1877, could be exercised were:—

- (i) There must be, within the aforesaid jurisdiction of the High Court, a person holding a public office, whether of a permanent or temporary nature, or a corporation or inferior Court of Judicature ;
- (ii) the doing or forbearing of a specific act must, under any law for the time being in force, be clearly incumbent on such person in his or its public character, or on such corporation in its corporate character ;
- (iii) such doing or forbearing should, in the opinion of the High Court, be also consonant to right or justice ;
- (iv) the property, franchise or personal right of the applicant should be liable to injury by the forbearing or doing, as the case may be, of the said specific act ;
- (v) the applicant should have no other specific and adequate remedy for enforcing the doing or forbearing from the specific act.

### Exemptions.

Section 45 of the Specific Relief Act, 1877, further provided that the High Court shall not have the power to make :—

- (i) any order binding on.....the Governor of Bombay, Madras and Bengal..... ;
- (ii) any order on any servant of the Government, as such, merely to enforce the satisfaction of a claim upon the Union or the State ;
- (iii) any order which is otherwise expressly excluded by any law for the time being in force.

### Procedure.<sup>2</sup>

The procedure prescribed under the Act had been borrowed from English practice. The application under Section 45 was to be supported by an affidavit of the person injured, stating his right in the matter in question, his demand of justice and denial thereof. If the application was not summarily rejected, the Court could make an order absolute in the first instance, or grant a rule to show cause why the order applied for should not be made. In the latter case the Court could pass an order in the alternative either to do or forbear the act mentioned or to signify some reason to the contrary. If the person, Court, or corporation made no answer or made an insufficient answer, the High Court would then issue a peremptory order to do or forbear the act absolutely.

\* 2. Sections 46-47 of the Specific Relief Act, 1877.



For the purposes of execution and appeal, an order passed by the High Court under that chapter was treated as if it were a decree made in the exercise of its original civil jurisdiction<sup>3</sup>. The High court could<sup>4</sup>, in disposing of the application, make such orders as to costs as it deemed fit. Section 51 of the Specific Relief Act, 1877, gave the High Court the power to frame rules to regulate the procedure for the purposes of relief under Section 45 of the Act.

#### Provisions under the Constitution.

As observed earlier, the power to issue an order in the nature of *mandamus* under Section 45 of the Specific Relief Act was confined to the Presidency High Courts in their original jurisdiction. These High Courts could not exercise this power outside their original jurisdiction and the other High Courts in India did not have this power at all where the relief in such cases seems to have been through a regular suit whereas Section 45 of the Act provided a summary remedy. Except for the historical cause, there seemed to be no reason or justification for limiting totally the powers of other High Courts and partially the power of the Presidency High Courts. The defect and disparity in this sphere was removed by vesting, through the Constitution of India, a power in the Supreme Court and all the High Courts to issue writs or other directions wherever the ends of justice may so require.

*Art. 32 of the Constitution lays down :*

“The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this part”.<sup>5</sup>

—————

3. Section 48, Specific Relief Act, 1877.

4. Section 49, Specific Relief Act, 1877.

5. i. e., Part III on Fundamental Rights.

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